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Jamey Holmes

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**IS THE FEDERAL AVIATION ADMINISTRATION
"KICKING THE DOG?": PILOT DISCIPLINARY
PROCEEDINGS AND THE SELF-
INCRIMINATION PRIVILEGE**

JAMEY HOLMES

I. INTRODUCTION

BY VIRTUE OF the Federal Aviation Act of 1958 (the Act),¹ every pilot in the United States must be examined and certified by the Federal Aviation Administration (FAA).² Periodically, the Administrator of the FAA may re-examine the fitness and qualifications of these individuals and, in the interest of public safety, may issue orders modifying, suspending, or revoking their certificates.³ The Act also establishes elaborate administrative and judicial processes for the implementation of certificate actions.⁴ Significantly, while these processes provide the defendant pilots with many of the traditional hallmarks of due process, courts have denied these pilots the right to refuse to divulge self-incriminatory testimony.⁵ Under current standards, federal authorities may revoke or suspend the license of a pilot on the strength of his own testimony.

The fifth amendment, in its broadest form, is available

¹ 49 U.S.C. app. §§ 1301-1557 (1988).

² *Id.* § 1430(a). Section 1430(a)(1) provides that it shall be "unlawful" to operate an aircraft without a valid certificate issued by the FAA. *Id.*

³ *Id.* § 1429(a).

⁴ *Id.*; see *infra* notes 35-78 and accompanying text.

⁵ See, e.g., *Roach v. NTSB*, 804 F.2d 1147 (10th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988).

only to criminal defendants.⁶ The privilege entitles such individuals to refuse to take the witness stand or answer any inquiries at their own trial.⁷ A more limited self-incrimination privilege is extended to all witnesses regardless of the form of the proceedings.⁸ It confers the right to refuse to disclose any information which poses a reasonable threat of future criminal prosecution.⁹ For these purposes, courts generally agree that all punitive sanctions are criminal.¹⁰ Furthermore, they recognize that even ostensibly civil sanctions may be punitive in their application and effect.¹¹ An affirmative finding on either account is sufficient to activate the protection of the fifth amendment.

The refusal of the courts to extend the privilege to pilots facing decertification is based largely on their determination that certificate actions are neither punitive by design nor in their application and effect.¹² With regard to the former conclusion, the courts often note, for example, that criminal punishment is characterized by the intent to punish an offender.¹³ Thus, Oliver Wendell Holmes, writing in the late 19th century, remarked, "[E]ven a dog distinguishes between being stumbled over and being kicked."¹⁴ Because the certificate action is an integral part of a vital regulatory act, courts generally find that the intent of Congress in providing for revocations and suspensions was primarily remedial.¹⁵

The latter consideration recognizes that the sanction may be intended as a civil penalty but in its purpose and

⁶ U.S. CONST. amend. V.

⁷ *Id.*; see *infra* notes 91-102 and accompanying text.

⁸ See *infra* notes 103-141 and accompanying text.

⁹ *Id.*

¹⁰ See *infra* note 144 and accompanying text.

¹¹ See, e.g., *United States v. Ward*, 448 U.S. 242, 248-49 (1980); see *infra* notes 147-150, 153-168 and accompanying text.

¹² *Roach*, 804 F.2d at 1153-54.

¹³ See *infra* note 144 and accompanying text.

¹⁴ O. HOLMES, *THE COMMON LAW* 3 (1881).

¹⁵ *Roach*, 804 F.2d at 1154.

effect be purely punitive.¹⁶ This is true, for example, if the ostensibly civil penalty bears no rational relation to the damage caused by the transgression.¹⁷ While the courts uniformly recognize this notion, they have adopted a very deferential position. If the court finds that Congress intended a particular sanction as a mere "civil penalty," current standards require the "clearest proof" of punitive effect to negate that intention.¹⁸ In the absence of such proof, the defendant is not extended the constitutional protections guaranteed to "true" criminal defendants.

The reluctance of the courts to scrutinize these sanctions more closely has led to an increased use of civil penalties as a means of enforcement, particularly of administrative regulations.¹⁹ In essence, the courts relieved the government of many of the severe burdens it carries in criminal prosecutions.²⁰ At the same time, however, the courts have at least partially abdicated their most central function — the protection of the rights of the accused. In fact, by adopting this approach, the courts have permitted the legislature to dictate the constitutional rights of defend-

¹⁶ *Ward*, 448 U.S. at 249.

¹⁷ See Charney, *The Need for Constitutional Protections for Defendant in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 497-500 (1974).

¹⁸ *Ward*, 448 U.S. at 248-49.

¹⁹ See Charney, *supra* note 17, at 481-82.

²⁰ *Id.* See, e.g., S. REP. NO. 1014, 92d Cong., 2d Sess. 2-3 (1972). In discussing proposed changes to the Intercoastal Shipping Act, 46 U.S.C. §§ 814-15, 817, 822, 831, 844 (1977) (current version at 46 U.S.C. §§ 814-15, 817, 822, 831, 844 (1988)), the Senate Report notes the advantages of civil penalties and discusses the administrative burdens of criminal process:

Penalties provided for violations of many of the provisions of the Shipping Act of 1916 are criminal. Where there appears to have been a violation of one of these provisions it is necessary to conduct an investigation of the incident, to thoroughly document the violation, and then to refer it to the Department of Justice for prosecution. Adequate documentation is time consuming Additional time and effort is expended by the Department in its review and evaluation of the offense. . . .

To change the penalties for violations of these provisions from criminal to civil should make the documentation of violations simpler

S. REP. NO. 1014 at 2-3.

ants through a mere choice of labels.²¹ In short, pilots are refused the fifth amendment rights of more traditional criminal defendants largely on the basis of a perceived remedial congressional intent and the absence of "clearest proof" of a contrary impact.²² To borrow from the language of Justice Holmes, the courts have concluded that Congress never intended to "kick" the pilots, but merely stumbled over them as it groped toward heightened public safety.

The following Comment takes the position that the constitutional privilege against self-incrimination should be extended to pilots facing decertification. It addresses the issue from three perspectives: first, it argues that pilot decertification actions are criminal in nature and that therefore, all constitutional safeguards applicable to criminal defendants should be available to the pilot.²³ This discussion focuses on the fact that certificate actions bear many of the traditional hallmarks of criminal punishment. For example, they entail severe economic losses, involuntary loss of property rights, and the imposition of a stigma among the profession. Furthermore, certificate actions unrelated to the pilot's technical qualifications are purely punitive, strong indicia of criminal punishment. Finally, in contrast to purely regulatory sanctions, decertification does not perform a compensatory function.

Secondly, this Comment proposes that the proceedings are, at a minimum, "quasi-criminal."²⁴ In a long line of cases, the Supreme Court has held that certain proceedings, although civil with regard to other constitutional protections, are sufficiently criminal for purposes of invoking the self-incrimination privilege.²⁵ While property forfeitures by reason of an offense are sufficiently criminal

²¹ Charney, *supra* note 17, at 482.

²² *Ward*, 448 U.S. at 248-49.

²³ See *infra* notes 214-298 and accompanying text.

²⁴ See *infra* notes 299-330 and accompanying text.

²⁵ See, e.g., *United States v. United States Coin and Currency*, 401 U.S. 715 (1971) (property forfeiture); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (same); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886) (same).

to trigger the protection of the fifth amendment, for example, they do not activate the double jeopardy or due process clauses of the fourth amendment.²⁶ The protection of the fifth amendment, the Court has stated, is "broader" than that of other constitutional safeguards.²⁷

Finally, this Comment recognizes that the testimony of pilots in such circumstances could form the basis of subsequent criminal charges.²⁸ Many state laws make various forms of reckless or unsafe operation of an aircraft a criminal act.²⁹ Thus, the testimony elicited from the pilot is often co-extensive with that necessary to establish a crime. In the absence of a grant of immunity, denial of the privilege to refuse to answer specific inquiries under these circumstances may subject the pilot to a "real and substantial" threat of future criminal prosecution.³⁰

The following discussion begins with a brief sketch of the usual course of pilot disciplinary proceedings. Section III then discusses the applications of the fifth amendment generally and the scope of the self-incrimination privilege.³¹ It notes both the witness' privilege as well as the defendant's privilege. Section IV focuses on the pivotal issue of the classification of sanctions as criminal or civil, and discusses various means by which the courts have attempted to rationalize the distinction.³² Section V examines the current availability of the fifth amendment

²⁶ *Boyd*, 116 U.S. at 633-34.

²⁷ *See, e.g.*, *Helvering v. Mitchell*, 303 U.S. 391, 400 n.3 (1938); *United States v. Regan*, 232 U.S. 37, 50 (1914).

²⁸ *See infra* notes 231-344 and accompanying text.

²⁹ *See, e.g.*, COLO. REV. STAT. § 41-1-108 (1990)(operation of planes in violation of federal registration requirements); COLO. REV. STAT. § 41-2-102 (West Supp. 1990)(operation of plane while intoxicated or under the influence of drugs); NEB. REV. STAT. §§ 28-1465, 28-1466 (1989)(operation of aircraft while under the influence of alcohol or narcotics); N.Y. GEN. BUS. LAW §§ 245-46 (McKinney 1988)(careless or reckless operation of aircraft); TEX. REV. CIV. STAT. ANN. art. 46f-1 (West Supp. 1991)(taking off, maneuvering, or landing a plane on a road or highway except in time of emergency).

³⁰ *See, e.g.*, *Roach v. NTSB*, 804 F.2d 1147 (10th Cir. 1986) *cert. denied*, 486 U.S. 1006 (1988); *People v. Agnew*, 107 Colo. 399, 113 P.2d 424 (1941).

³¹ *See infra* notes 79-141 and accompanying text.

³² *See infra* notes 142-187 and accompanying text.

privilege against self-incrimination in decertification proceedings through an analysis of the Tenth Circuit's decision in *Roach v. National Transportation Safety Board*.³³ Finally, Section VI offers various arguments in support of extending the privilege to decertification proceedings.³⁴

II. THE PILOT DISCIPLINARY PROCEEDING

As previously noted, the Federal Aviation Act³⁵ requires every pilot in the United States to be examined and certified by the Federal Aviation Administration.³⁶ In this regard, the Act empowers the FAA to evaluate the performance and qualifications of persons applying for pilot certification³⁷ and to periodically re-examine their qualifications.³⁸ The FAA also promulgates rules and regulations establishing minimum standards for the maintenance of flight safety³⁹ and in the interest of public safety, may initiate enforcement proceedings and impose penalties.⁴⁰ The agency reviews alleged violations through an administrative and judicial process⁴¹ and potential sanctions include money fines and the "amending, modifying, suspending or revoking of an airman's certificate."⁴²

³³ 804 F.2d 1147 (10th Cir. 1986). See *infra* notes 188-211 and accompanying text.

³⁴ See *infra* notes 212-344 and accompanying text.

³⁵ 49 U.S.C. app. §§ 1301-1557 (1988).

³⁶ 49 U.S.C. app. § 1430(a). See *supra* note 1.

³⁷ *Id.* § 1422(a). In order to qualify for a certificate, an applicant must demonstrate a certain level of competency and knowledge, and he must hold a medical certificate appropriate for the flying to be done. *Id.* § 1422(b)(1).

³⁸ 49 U.S.C. app. § 1429 (1988). In fact, recently-enacted regulations require the airmen themselves to report certain occurrences reflecting on their qualifications to the FAA. Pilots Convicted of Alcohol- or Drug-Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedures, 55 Fed. Reg. 31,300, 31,309 (1990) (to be codified at 14 C.F.R. §§ 61, 67) (proposed Aug. 1, 1990). If the examiner finds that "safety in air commerce or air transportation and the public interest requires," the Administrator is empowered to suspend or revoke the pilot's license. *Id.*; V. ROLLO, AVIATION LAW: AN INTRODUCTION 214, 217 (1985).

³⁹ 49 U.S.C. app. § 1421(a).

⁴⁰ *Id.* § 1354.

⁴¹ *Id.* §§ 1471, 1473(b),(c); Federal Aviation Regulations, 14 C.F.R. §§ 13.15-13.16 (1990).

⁴² 49 U.S.C. app. § 1429.

In furtherance of its enforcement powers, the Act gives the FAA the authority to investigate reported violations of the Act itself, and FAA Regulations and orders of the Administrator.⁴³ The Act also provides that investigative proceedings may be commenced through a third party complaint or on the Administrator's own initiative. With regard to the former, any individual may file a complaint with the Administrator, and where reasonable grounds exist, the FAA shall investigate.⁴⁴ Alternatively, the Administrator may begin an investigation at any time on its own initiative as to any matter within its jurisdiction and concerning which a complaint is authorized to be made.⁴⁵

In either case, the Administrator typically has the option of "administrative" or "legal" enforcement actions.⁴⁶ Essentially, administrative actions are warnings, analogous to warning citations issued by police officers.⁴⁷ They may be used only when "no significant unsafe condition or lack of competency exists."⁴⁸ Furthermore, the violation must have been inadvertent, and the violator must have a "good attitude."⁴⁹ Administrative sanctions differ from their legal counterparts in that no "substantive rights, privileges, or property" are denied the party against whom the action is taken.⁵⁰ In most cases, successful corrective action by the violator will avoid any fur-

⁴³ 49 U.S.C. app. § 1354(a) (1988); 14 C.F.R. § 13.3(a) (1990). Under § 13.3(a) of the Federal Aviation Regulations, the Administrator may "conduct investigations, hold hearings, issue subpoenas, require the production of relevant documents, records, and property, and take evidence and depositions." 14 C.F.R. § 13.3(a) (1990).

⁴⁴ 49 U.S.C. app. § 1482(a) (1988); 14 C.F.R. §§ 13.1(a), 13.5(a) (1990).

⁴⁵ 49 U.S.C. app. § 1482(b); 14 C.F.R. § 13.5(i) (1990).

⁴⁶ ROLLO, *supra* note 38, at 202-03. Legal actions are authorized by the Act. *See, e.g.*, 49 U.S.C. app. §§ 1429(a)-(c), 1471, 1473, 1487a (1988) (authorizing certificate actions, civil penalties, aircraft seizure, and injunctions). Similarly, authority for administrative actions can be found in the Federal Aviation Regulations. *See, e.g.*, 14 C.F.R. §§ 13.11(b)(1), 13.11(b)(2) (1990) (authorizing warning notices and letters of correction).

⁴⁷ ROLLO, *supra* note 38, at 202.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

ther sanction.⁵¹ Conversely, failure to take proper corrective action may result in the instigation of legal proceedings.⁵² Significantly, there is no right of appeal from an FAA administrative action.⁵³

Legal enforcement proceedings are generally initiated for more serious infractions or as an additional sanction for failure to respond to an administrative action.⁵⁴ These actions are also wide-ranging. They include certificate actions, civil penalties, and injunctions to enforce compliance with the orders and authorizations of the Administrator.⁵⁵ Typically, suspensions are limited to instances of operational infractions or where the operator's practices have demonstrated a lack of competence which can be corrected by remedial action.⁵⁶ Suspensions may, however, be imposed for purely disciplinary reasons.⁵⁷

The FAA generally seeks revocation of a certificate only in very specific circumstances. The Administrator typically will not revoke a pilot's certificate unless there is a deficiency of qualification which cannot be corrected in the short-term through remedial action, a demonstrated unwillingness to comply with air safety requirements, or where public policy otherwise demands such action.⁵⁸ The Administrator may, however, revoke a certificate if the violator possesses the necessary technical operating skills but exhibits a lack of good judgment.⁵⁹

Monetary or "civil" penalties are an alternative to the certificate actions. These penalties are particularly attractive in instances in which certificate actions would be unduly harsh or simply insufficient.⁶⁰ The Administrator

⁵¹ *Id.*

⁵² *Id.* at 202-03.

⁵³ *Id.*

⁵⁴ *Id.* at 203.

⁵⁵ See *supra* note 46.

⁵⁶ ROLLO, *supra* note 38, at 203.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See, e.g., *Specht v. Civil Aeronautics Bd.*, 254 F.2d 905 (8th Cir. 1958).

⁶⁰ ROLLO, *supra* note 38, at 203. The Act states that any person who violates a federal aviation safety regulation shall be subject to a civil penalty. 49 U.S.C. app.

may also subject any aircraft owned by the offender and actually used in the violation to a lien in the amount of the penalty.⁶¹ In any case, the Administrator has the power to compromise any penalty.⁶² Significantly, civil penalties are usually not instituted when there has been a certificate action or criminal punishment for the same offense; this policy avoids the appearance of double jeopardy.⁶³

Unless the Administrator determines that the situation requires otherwise, an initial inquiry by the FAA investigators follows the commencement of an enforcement action.⁶⁴ The national or regional FAA counsel then reviews the findings and recommendations of the investigators. Typically, counsel then issues a letter to the violator, which serves as notice of the proposed action and details the factual allegations and the specific violations alleged by the FAA.⁶⁵

In the case of civil penalties, this letter generally takes the form of an offer to compromise the administration's claim.⁶⁶ It sets forth the amount which the Administrator will accept in full settlement of the alleged violation. If a certificate action is proposed, a similar letter is issued, detailing whether suspension or revocation has been pro-

§ 1471(a) (1988). In most cases, the maximum penalty is \$1,000. In cases involving hazardous materials, however, the fine may amount to \$10,000. *Id.* The determination of the precise amount of the fine is determined from the "nature, circumstances, extent and gravity of the violation." *Id.*

⁶¹ 49 U.S.C. app. § 1471(b) (1988).

⁶² *Id.* § 1471(a)(2).

⁶³ ROLLO, *supra* note 38, at 203-04.

⁶⁴ *Id.* at 206.

⁶⁵ *Id.* If the Administrator finds that there is a need for emergency action, the FAA is authorized to issue such orders as are necessary without prior notice or opportunity to be heard by the alleged violators. *Id.* at 207. For example, the Act provides for immediately-effective certificate actions under emergency circumstances. 49 U.S.C. app. § 1429 (1988). In order to provide some semblance of due process, however, the Act also provides for an accelerated appeals process to the NTSB. *Id.* The NTSB must dispose of the case within 60 days from the date on which it is first notified of its pendency. *Id.* Similarly, if the Administrator has discovered a mechanical or design defect in aviation products of similar design, he may issue an airworthiness directive, prohibiting the operation of any product covered by the directive except in accordance with its requirements. 14 C.F.R. § 39 (1990). For a general discussion, see ROLLO, *supra* note 38, at 207.

⁶⁶ ROLLO, *supra* note 38, at 206.

posed, and in the case of the former, the length of the proposed suspension.⁶⁷

In response to this letter, the alleged violator may transmit the amount suggested in the letter or surrender his certificate for suspension or revocation, or he may submit an answer to the letter, requesting that it be considered in connection with the final disposition of the letter's allegations.⁶⁸ Alternatively, he may request an informal conference with the FAA counsel or the formal disposition of the case through National Transportation Safety Board (NTSB) proceedings. After exhausting all available administrative remedies, he may also appeal any decision to the United States Courts of Appeals.⁶⁹

If the alleged violator cannot reach an agreement with the FAA regarding the charges, the Administrator may initiate formal proceedings.⁷⁰ For example, in the case of a certificate action, the FAA will issue an Order of Certificate Action, including the Administrator's findings of fact, specifications of the regulations violated, and the sanction imposed. Similarly, in civil penalty actions, failure to reach an agreement with the Administrator will result in the initiation of United States District Court proceedings by the FAA. In these actions, the FAA typically seeks the maximum statutory penalty.⁷¹

Significantly, the Act empowers the respondent to appeal the decision of the Administrator to the NTSB for an adjudication on the merits.⁷² Upon petition or appeal, the NTSB assigns an administrative law judge (ALJ) to the case. The ALJ conducts a formal proceeding and makes initial findings of fact and conclusions of law. He is not bound by any findings of the Administrator, and he has the power and duty to ascertain the facts.⁷³ All parties

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 207.

⁷¹ *Id.*

⁷² 49 U.S.C. app. § 1429(a) (1988).

⁷³ 49 C.F.R. § 821.35 (1990).

have the opportunity to present evidence and make arguments in support of their case, and a formal record of the proceedings is made.⁷⁴ Unless reviewed by the NTSB, the decision of the ALJ is final.⁷⁵

The NTSB may review the findings of the ALJ on its own initiative or through an appeal by either party.⁷⁶ In either case, the extent of the review is extremely limited. The NTSB may examine only whether (1) the findings of the ALJ are supported by a preponderance of reliable, probative, and substantial evidence; (2) the ALJ's conclusions were made in accordance with precedent and policy; (3) the questions on appeal are substantial; and (4) any prejudicial errors have occurred.⁷⁷ The findings of the NTSB are final. Therefore, at this point, having exhausted all administrative remedies, the respondent may appeal to the appropriate United States Court of Appeals.⁷⁸

III. FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. *In General*

The fifth amendment provides in part that "no man shall be compelled in any criminal case to be a witness against himself."⁷⁹ This privilege arose largely out of the Framers' conviction that "too high a price may be paid . . . for the unhampered enforcement of the criminal law and that, in its attainment, other social objects . . . should not be sacrificed."⁸⁰ More specifically, the privilege reflects a distinct preference for an adversarial process as opposed

⁷⁴ *Id.* §§ 821.37-821.40 (1990).

⁷⁵ *Id.* § 821.43 (1990).

⁷⁶ *Id.* §§ 821.43, 821.47. If it chooses to review the findings *sua sponte*, the NTSB must file its request within twenty days of the ALJ's decision. *Id.* § 821.43. In addition, either party may appeal the findings by filing and serving notice of appeal upon the opposing counsel within ten days of the decision. *Id.* § 821.47.

⁷⁷ *Id.* § 821.49.

⁷⁸ 5 U.S.C. § 704 (1988); 49 U.S.C. app. § 1486 (1988).

⁷⁹ U.S. CONST. amend. V.

⁸⁰ *Feldman v. United States*, 322 U.S. 487, 489 (1944).

to the inquisitorial one of seventeenth century England.⁸¹ The Framers rejected the historical English practice of summoning individuals into court and questioning them under oath before lodging a formal accusation against them. In such cases, the reluctant accused typically faced the somber choices of "contempt for failure to respond, conviction of the charge being investigated, or torture to overcome his resistance."⁸²

The privilege also illustrates various evidentiary and social policy objectives.⁸³ For example, it reveals the Fram-

⁸¹ Ribble, *Origin and Development*, 5 VA. L. WEEKLY DICTA COMPILATION 1, 1-2 (1954).

⁸² M. BERGER, *TAKING THE FIFTH* 25 (1980). The use of compelled self-incrimination fell out of favor in England and the colonies by 1641. Ribble, *supra* note 81, at 3. In that year, Parliament abolished both of the primary inquisitorial bodies, the Court of the High Commission and the Star Chamber. *Id.*

The major catalyst for these events was the sensational heresy trial of John Lilburne in 1641. During the course of the proceedings, the prosecution sought to question him concerning other charges. Lilburne refused to answer such questions, stating:

I am not willing to answer you to any more of these questions, because I see you go about this examination . . . to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination. If I had been proceeded against by a bill, I would have answered.

Id. at 3.

Although the court convicted Lilburne and sentenced him to be whipped and pilloried, he later made a complaint to Parliament and was subsequently vindicated. Parliament also ordered the payment of 3,000 pounds as reparations. *Id.*

Also in 1641, Massachusetts enacted "The Body of Liberties" which included two explicit prohibitions on compelled self-incrimination. First, it prohibited the use of torture to extricate confessions in non-capital cases, and secondly, it provided that no man "shall be bound to inform, present, or reveal any private crime or offense wherein there is no peril to this plantation or any member . . . thereof." *Id.* at 5. Thus, with the somewhat dubious exception of the witch trials, the privilege was well-rooted in the colonies by the late 17th century. *Id.* at 7.

For a more complete discussion of the historical origins of the fifth amendment in the United States see M. BERGER, *supra* at 1-25; Ribble, *supra* note 81, at 1-9; Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

⁸³ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Justice Goldberg's statement of the principles of the fifth amendment privilege in *Murphy* is perhaps the most influential and widely-cited. Writing for the court, he stated:

[The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self incriminating statements will be

ers' desire for a prophylactic rule to avoid abuses by the police in their interrogations and their belief that an individual has a right to be let alone absent good cause for intrusion into his privacy.⁸⁴ Similarly, it recognizes that self-condemnatory statements may be unreliable either because of the defendant's fear of perjury and contempt charges or a "death-wish" mentality.⁸⁵ Recognizing the significance of these concerns, the Supreme Court has stated that "[t]his provision [of the amendment] must have a broad construction in favor of the right which it was intended to secure."⁸⁶ Furthermore, the Court has noted that it has been "zealous to safeguard the values that underlie the privilege."⁸⁷

Significantly, these policy objectives largely determine the contours of the modern privilege.⁸⁸ Because modern techniques of acquiring self-incriminatory information are more indirect and subtle, confining the privilege to its historical origins (*e.g.*, the extraction of confessions through torture) would effectively render it useless in modern practice. Twentieth century courts have, therefore, focused on the privilege's various policy concerns and developed a broader, more inclusive privilege.⁸⁹ Questions remain, however, regarding the relative importance of these goals and their application. In the opinion of one scholar, the result is a mere "shopping list of rationales"

elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often a "protection to the innocent."

Id. (citations omitted); *see also* M. BERGER, *supra* note 82, at 25-44.

⁸⁴ M. BERGER, *supra* note 82, at 25-44.

⁸⁵ *Id.*

⁸⁶ *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

⁸⁷ *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

⁸⁸ M. BERGER, *supra* note 82, at 25.

⁸⁹ *Id.*

from which the lower courts are left to pick and choose without rational guidance.⁹⁰

B. *The Defendant's Privilege*

In a criminal proceeding, the fifth amendment provides the defendant with an unqualified right to choose not to testify in his own behalf.⁹¹ This "defendant's privilege" entitles the individual to be free of any questions whatsoever. It rests on the assumption that upon examination the prosecutor will seek to elicit only relevant, incriminatory facts from the defendant. Therefore, he should be privileged to refuse to subject himself to any examination as a matter of law.⁹²

The defendant's privilege is, however, subject to various limitations. For example, by its own terms the fifth amendment applies only to "compelled" testimony. Thus, the introduction at trial of the defendant's prior deposition or voluntary grand jury testimony does not violate the defendant's privilege.⁹³ This is true even though it may essentially require the defendant to take the stand

⁹⁰ *Id.* at 26.

⁹¹ *See, e.g.,* Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988).

⁹² M. BERGER *supra* note 82, at 56-57. Significantly, documentary evidence presents a special issue. Business records of the defendant, for example, may be subpoenaed by the government or its agencies. Their production is protected by the fifth amendment as testimony only if the *preparation* of the documents was compelled. The production of voluntarily prepared personal papers is not privileged unless the act of producing them would, of itself, incriminate the holder. *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987 — The Fifth Amendment at Trial*, 76 GEO. L.J. 1018, 1022-23 (1988) [hereinafter *Annual Review*]. Compare *Fisher v. United States*, 425 U.S. 391 (1976)(documents must be prepared under compulsion in order to be protected by fifth amendment) with *United States v. Doe*, 465 U.S. 605, 612-14 (1984)(defendant is protected from forced delivery of incriminating documents, even though voluntarily prepared, if the delivery essentially requires him to authenticate them).

⁹³ *Annual Review, supra* note 92, at 1021; *see also* *United States v. Babb*, 807 F.2d 272 (1st Cir. 1986)(defendant's testimony at grand jury hearing admissible at trial); *United States v. Jenkins*, 785 F.2d 1387 (9th Cir. 1986)(deposition and grand jury testimony admissible at trial when deposition given freely in civil action arising out of same facts and defendant did not claim fifth amendment privilege before testifying to grand jury), *cert. denied*, 479 U.S. 855 (1986).

in order to rebut the prior testimony.⁹⁴

Additionally, the privilege applies only to testimonial or communicative evidence and may only be invoked if the proceedings are criminal or "quasi-criminal" in nature, and is available only to natural persons which of course does not include corporations.⁹⁵ More specifically, it does not extend to proceedings to impose remedial or regulatory sanctions,⁹⁶ and it excludes evidence such as participation in a lineup,⁹⁷ the demonstration of speech⁹⁸ or handwriting characteristics,⁹⁹ and the taking of a blood-alcohol test.¹⁰⁰

Finally, if the defendant elects to take the stand, he waives the right to remain silent and must, on cross examination, answer all questions "reasonably related" to the substance of his direct testimony.¹⁰¹ Any subsequent claim of privilege is then subject to the limitations gener-

⁹⁴ *Annual Review*, *supra* note 92, at 1021.

⁹⁵ *See, e.g.*, *Hale v. Henkel*, 201 U.S. 43, 69 (1906)("[The] right of a person under the [f]ifth [a]mendment to refuse to incriminate himself is a purely personal privilege. . .").

In explaining its holding, the Court noted that corporations exist wholly apart from their officers, directors, and shareholders and that the privilege never intended to permit an individual to plead the fact that some third person might be incriminated by his testimony. *Id.* at 69-70. Furthermore, the Court stated, because corporations can act only through their agents, allowing them to assert the privilege would in many cases deprive the courts of the only evidence of a corporate crime. *Id.* at 70.

Finally, the Court held that to extend the privilege to corporations would lead to a "strange anomaly [sic]" in which the state lost power over organizations created and existing only under the state's authority. *Id.* at 75. Significantly, the continued power of the state to supervise the corporation and ensure that it abides by its obligations also survives the corporation itself. For this reason, it has been held that there is no fifth amendment obstacle to the compelled production of the records of a defunct corporation, even though they had been transferred to individuals. *See, e.g.*, *Grant v. United States*, 227 U.S. 74 (1913); *Wheeler v. United States*, 226 U.S. 478 (1913). *See generally* M. BERGER, *supra* note 82, at 58-59.

⁹⁶ *See, e.g.*, *United States v. Ward*, 448 U.S. 242 (1980); *Roach*, 804 F.2d at 1151.

⁹⁷ *United States v. Wade*, 388 U.S. 218, 222-23 (1967).

⁹⁸ *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973).

⁹⁹ *Gilbert v. California*, 38 U.S. 263, 266-67 (1967).

¹⁰⁰ *Schmerber v. California*, 384 U.S. 757, 765 (1966).

¹⁰¹ *Annual Review*, *supra* note 92, at 1018; *see also* *United States v. Kimberlin*, 805 F.2d 210, 237 (7th Cir. 1986) (defendant directed to answer questions regarding alibi because they were reasonably related to his testimony on direct), *cert. denied*, 483 U.S. 1023 (1987); *United States v. Black*, 767 F.2d 1334, 1341 (9th Cir.) (when

ally applicable to the witness' privilege.¹⁰²

C. *The Witness' Privilege*

In addition to the criminal defendant's privilege, the fifth amendment can be asserted in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."¹⁰³ To invoke this privilege, the party must take the stand, be sworn, and assert the privilege in response to each allegedly incriminating question as it is asked.¹⁰⁴ Although the witness and his counsel make the initial determination of entitlement ultimately this is a question for the court.¹⁰⁵ Moreover, the burden of establishing the availability of the privilege lies with the party invoking its protection.¹⁰⁶

Significantly, the witness is not required to prove the incriminating nature of the requested testimony "in the sense in which a claim is usually required to be established in court."¹⁰⁷ To impose such a requirement, the Court has noted, would compel the witness "to surrender the very protection the privilege is designed to guarantee."¹⁰⁸ Nevertheless, the Supreme Court has not established consistent standards regarding the level of proof

defendant took stand he waived privilege on cross examination as to those matters put into issue by direct testimony), *cert. denied*, 474 U.S. 1022 (1985).

¹⁰² See *infra* notes 103-141 and accompanying text.

¹⁰³ *Kastigar*, 406 U.S. at 445; *Roach*, 804 F.2d at 1151.

¹⁰⁴ *Roach*, 804 F.2d at 1151; *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974).

¹⁰⁵ See, e.g., *United States v. Hoffman*, 341 U.S. 479, 486 (1951); *Ueckert v. Commissioner*, 721 F.2d 248, 250 (8th Cir. 1983).

¹⁰⁶ *Hoffman*, 341 U.S. at 486; *Roach*, 804 F.2d at 1151; *Ueckert*, 721 F.2d at 250. In *Hoffman*, the Court stated, "[t]he witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified. . . ." *Hoffman*, 341 U.S. at 486.

¹⁰⁷ *Hoffman*, 341 U.S. at 486.

¹⁰⁸ *Id.*

necessary to establish the applicability of the privilege.¹⁰⁹

The more restrictive of the standards is drawn from *Marchetti v. United States*.¹¹⁰ In that case, the Court upheld the fifth amendment claims of an individual charged with evading federal statutes providing for registration and taxation of individuals involved in illegal wagering.¹¹¹ The defendant argued that the registration provisions of the statute essentially required him to incriminate himself, and the Supreme Court agreed. In holding for the defendant, the Court stated that the privilege is available when testimony in question poses "substantial and 'real' and not merely trifling or imaginary, hazards of incrimination."¹¹²

In *Hoffman v. United States*,¹¹³ the Court took a much more liberal approach. Therein, the majority stated that "it need only be evident . . . that a responsive answer . . . might be dangerous" to the witness.¹¹⁴ As a result, the witness' claim is invalid only if "it is *perfectly clear* . . . that the answer[s] *cannot possibly* have" a tendency to incriminate.¹¹⁵ Moreover, the *Hoffman* court held that the privilege extends beyond testimony that is of itself sufficient to establish a crime and includes that which would merely "furnish a link in the chain of evidence needed to prosecute the claimant."¹¹⁶ In the absence of specific guidance,

¹⁰⁹ *Annual Review*, *supra* note 92, at 1023-24.

¹¹⁰ 390 U.S. 39 (1968).

¹¹¹ *Id.* at 61.

¹¹² *Id.* at 53.

¹¹³ *Hoffman*, 341 U.S. 479 (1951).

¹¹⁴ *Id.* at 486-87 (emphasis added).

¹¹⁵ *Id.* at 488 (emphasis in original)(quoting *Temple v. Commonwealth*, 75 Va. 899, 898 (1881)).

Significantly, however, the *Hoffman* court also stated in dicta that the protection of the amendment "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Id.* at 486. This language is much closer to the *Marchetti* standard and seemingly contradicts the broader, more inclusive standard enunciated in the *Hoffman* holding. Lower courts have, on occasion, quoted the restrictive passage from *Hoffman* without reference to the broad standard applied by that court. *See, e.g., Roach*, 804 F.2d at 1151.

¹¹⁶ *Hoffman*, 341 U.S. at 486 (citation omitted). Significantly, in a later opinion styled *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965), the Court further expanded the standard. In that case, the Court held that the privi-

lower courts continue to apply both standards.¹¹⁷

Significantly, under either standard, the determination is essentially subjective.¹¹⁸ In *Hoffman*, for example, the Court stated that the trial judge "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."¹¹⁹ Furthermore, in 1972 the Court recognized the witness' own subjective belief as a standard by which to determine the privilege's applicability.¹²⁰ Specifically, in *Kastigar v. United States*,¹²¹ the Court held that the privilege protects against any "disclosures that the witness reasonably believes could be used [against him] in a criminal prosecution or could lead to other evidence which might be so used."¹²² In the face of such liberal standards, most courts have generally upheld the right of witnesses to refuse to answer questions on grounds of self-incrimination.¹²³

The witness' privilege is, however, subject to various limitations. For example, having voluntarily testified to a fact, a witness cannot then refuse to give further details unless disclosure would lead to further self-incrimination.¹²⁴ In fact, the Seventh Circuit held that a witness

lege was not limited to inquiries calling for directly incriminating responses but also extended to those whose answers might provide clues to law enforcement officials. *Id.* at 80-81. See also L. TAYLOR, WITNESS IMMUNITY 17-18 (1983).

¹¹⁷ *Annual Review*, *supra* note 92, at 1024. See, e.g., *Kimberlin*, 805 F.2d at 236-37 (questions seeking only names and destinations related to defendant's alibi proper because they did not create a substantial threat of incriminating responses); *United States v. Chalan*, 812 F.2d 1302, 1310 (10th Cir. 1987) (following *Hoffman*, holding that witness entitled to privilege even though he had not been charged, when testimony would have revealed close association with defendant at time of alleged robbery).

¹¹⁸ L. TAYLOR, *supra* note 116, at 18.

¹¹⁹ *Hoffman*, 341 U.S. at 487 (quoting *Ex Parte Irvine*, 74 F. 954, 960 (C.C.S.D. Ohio 1896)).

¹²⁰ L. TAYLOR, *supra* note 116, at 18-19.

¹²¹ 406 U.S. 441 (1972).

¹²² *Id.* at 444-45.

¹²³ L. TAYLOR, *supra* note 116, at 19.

¹²⁴ *Annual Review*, *supra* note 92, at 1024. An exception to this rule is provided by Federal Rule of Evidence 608 which allows the witness to selectively take the fifth amendment when the questions go only to his or her credibility. After providing for the use of specific instances of conduct to attack or support the witness' character for truthfulness, Rule 608 states, "[t]he giving of testimony, whether by

who confesses on the stand to wrongdoing cannot subsequently refuse to elaborate.¹²⁵

Furthermore, and perhaps most importantly, the government may compel a witness to answer questions through a grant of immunity from future prosecution. If the witness refuses, he may then be punished for contempt of court.¹²⁶ In theory, if not in practice, his fifth amendment rights have been supplanted by the equivalent protection of immunity from future prosecution.¹²⁷ For this reason, a grant of immunity is not elective. Unless offered to the witness as a part of a plea bargain or some other official option, it cannot be refused.¹²⁸ As a result, immunity is most often termed "imposed" rather than "granted."¹²⁹

Immunity may take either of two forms: use immunity (i.e. "use and derivative" immunity) or transactional immunity.¹³⁰ The former protects the witness by barring the use of his testimony in any future criminal prosecution.¹³¹ In addition, in any subsequent criminal action, the burden is on the government to show that any evidence produced is not derived from the immunized testimony.¹³² Nothing however, prevents the government from prosecuting the

an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility." FED. R. EVID. 608.

¹²⁵ *United States v. Silverstein*, 732 F.2d 1338, 1344-45 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

¹²⁶ L. TAYLOR, *supra* note 116, at 30-31.

¹²⁷ *Kastigar*, 406 U.S. at 453 (the protection of the immunity statute is co-extensive with that of the fifth amendment). In practice however, there may be many reasons for a witness' refusal to testify even under a grant of immunity. That is, he may feel that criminal immunity does not afford him sufficient protection. More specifically, he may fear civil liability, public disgrace, or loss of his employment. Alternatively, in a serious criminal matter, he may be endangered by incriminating other suspects. L. TAYLOR, *supra* note 116, at 31.

¹²⁸ L. TAYLOR, *supra* note 116, at 30.

¹²⁹ See, e.g., L. TAYLOR, *supra* note 116, at 109.

¹³⁰ *Id.* at 30.

¹³¹ *Id.*

¹³² *Kastigar*, 406 U.S. at 460 ([t]he prosecution has an affirmative duty to prove that the evidence is "derived from a legitimate source wholly independent of the compelled testimony."); *Annual Review*, *supra* note 92, at 1025-26.

witness for offenses about which he testified if it can obtain sufficient evidence independently of the immunized testimony.¹³³

Transactional immunity is significantly broader as it provides the witness with protection from prosecution for any offense about which he testifies.¹³⁴ It ensures that, at least within the jurisdiction in which he testifies, no prosecution will arise from any "transaction" about which the witness testifies.¹³⁵ This is true regardless of the amount of evidence obtained by the government independently of the testimony. This form of immunity is currently found in many state jurisdictions.¹³⁶

In the federal system, witness immunity is governed by the Organized Crime Control Act of 1970.¹³⁷ It provides specific procedures for the granting of use and derivative immunity to witnesses testifying before federal courts and grand juries.¹³⁸ This act also provides for the grant of im-

¹³³ L. TAYLOR, *supra* note 116, at 30.

¹³⁴ *Id.*

¹³⁵ *Id.* at 30, 75-78.

¹³⁶ *Id.* at 30.

¹³⁷ 18 U.S.C. § 6002 (1988). The statute provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. Thus, the statute creates use and derivative use immunity and provides for unrestricted application to any federal offense. L. TAYLOR, *supra* note 116, at 36. See also *Kastigar*, 406 U.S. at 462 (upholding the constitutionality of § 6002).

¹³⁸ 18 U.S.C. § 6003 (1988). This section provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in

munity in proceedings before administrative or legislative bodies.¹³⁹

In both contexts, the government's power to compel testimony through immunity is subject to serious con-

which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide information on the basis of his privilege against self-incrimination.

Id.

¹³⁹ 18 U.S.C. §§ 6004-05 (1988). With regard to administrative proceedings, § 6004 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Id. As for proceedings before the legislature, § 6005 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

straints.¹⁴⁰ For example, a federal agency may impose immunity only after it has received approval from the attorney general, determined that the information is "necessary to the public interest," and been confronted with a refusal to testify based on the fifth amendment privilege or with a witness who is likely to refuse to testify.¹⁴¹

IV. CLASSIFICATION OF PROCEEDINGS

A. *In General*

Because the fifth amendment rights of criminal and civil defendants differ, the classification of proceedings as either criminal, civil, or "quasi-criminal" is the threshold issue in assessing a defendant's refusal to testify.¹⁴² This section examines the various lines of analysis utilized by the courts in making that distinction. It identifies the traditional hallmarks of criminal punishment and subse-

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that —

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the members present of that House;

(2) in the case of a proceeding before a committee or subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the Members of the full committee; and

(3) ten or more days prior to the day on which the request for such an order was made, the Attorney General was served with notice of intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

Id.

¹⁴⁰ L. TAYLOR, *supra* note 116, at 109.

¹⁴¹ 18 U.S.C. § 6004 (1988); L. TAYLOR, *supra* note 116, at 109. Interestingly, one commentator has suggested that in light of these facts, a witness seeking a valid grant of immunity might be well advised to refuse to answer incriminating questions, specifically citing the fifth amendment privilege. He should also insist upon being subpoenaed to testify or produce records in order to strengthen his later argument that any incriminating testimony was compelled. *Id.* at 109-10.

¹⁴² See, e.g., *Roach v. NTSB*, 804 F.2d 1147 (10th cir. 1986), *cert. denied*, 486 U.S. 1006 (1988).

quently, addresses the unique doctrine of the "quasi-criminal" sanction.

B. "Criminal" Sanctions

The distinction between civil and criminal sanctions has attracted a great deal of scrutiny and scholarship for many years. Courts and commentators alike have proposed various objective criteria and standards for making this determination. As previously noted, for example, Justice Holmes suggested that the essence of criminal punishment is the punitive or vengeful motive of the inflictor.¹⁴³ While the distinction continues to attract attention, courts generally agree that all laws serving primarily to punish are criminal in nature.¹⁴⁴ Furthermore, the punitive nature of a given sanction is largely a question of statutory interpretation.¹⁴⁵ This analysis, in turn, focuses chiefly on legislative history, and any express or implied legislative intent is treated with great deference.¹⁴⁶

In 1980, the Supreme Court adopted this approach in *United States v. Ward*, holding that the civil penalty provisions of the Federal Water Pollution Control Act¹⁴⁷ did not constitute punitive sanctions.¹⁴⁸ The Court enunciated a two-step test for distinguishing criminal and civil sanctions in this decision. The first step, the Court stated, is to determine any congressional preference for one form of action over the other. Second, if Congress indicated such a preference, it is presumed to have been enacted, and the Court need only inquire as to whether the statute is "so punitive either in purpose or effect as to negate . . . [Congress'] intention."¹⁴⁹

¹⁴³ O. HOLMES, *supra* note 14, at 3.

¹⁴⁴ See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886). See generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 385-86 (1976).

¹⁴⁵ See, e.g., *United States v. Ward*, 448 U.S. 242, 248 (1980).

¹⁴⁶ Charney, *supra* note 17, at 492-94.

¹⁴⁷ 33 U.S.C. § 1321(b)(6) (1988).

¹⁴⁸ *Ward*, 448 U.S. at 250-51.

¹⁴⁹ *Id.* at 248-49.

In seeking out congressional intent, the *Ward* Court and subsequent courts have taken particular note of the structure of the statute and its procedural enforcement mechanisms. For example, they have inquired as to whether the statute delineates "civil" and "criminal" penalties in separate sections.¹⁵⁰ In addition, the Court has monitored whether the proceedings were in rem or in personam, whether summary administrative proceedings were authorized, and the scope and aims of the penalties and sanctions.¹⁵¹

With regard to the second prong of the inquiry, the Court has traditionally performed a broad examination of various historical, social and structural considerations. In the landmark case of *Kennedy v. Mendoza-Martinez*¹⁵² the court inquired whether the sanction provided for an affirmative disability or restraint, required a finding of scienter, or promoted the traditionally punitive goals of deterrence and retribution.¹⁵³ The Court also considered the sanction's historical treatment, whether the conduct to which it applies is already a crime, and whether it is excessive in relation to its ostensibly civil purpose.¹⁵⁴

Another frequently cited characteristic of the criminal sanction is the sense of concurrent "moral condemnation."¹⁵⁵ The Court has in many instances recognized that "what distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition."¹⁵⁶ The view is

¹⁵⁰ *Id.* at 249; see also *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 13 (2d Cir. 1982), cert. denied sub nom. *Aponte v. United States*, 465 U.S. 1099 (1984).

¹⁵¹ *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984). See *infra* notes 239-243 and accompanying text.

¹⁵² 372 U.S. 144 (1963).

¹⁵³ *Id.* at 168-69.

¹⁵⁴ *Id.* Significantly, the Court noted that this list is not exhaustive or dispositive. For example, the revocation of a privilege freely granted is normally not punitive or criminal. *Helvering v. Mitchell*, 303 U.S. 391 (1938). For a more complete discussion of the *Kennedy* factors, see Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241 (1985).

¹⁵⁵ Charney, *supra* note 17, at 496-500.

¹⁵⁶ See, e.g., Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404

premised on the position that people associate the commission of intentional wrongful acts with criminal proceedings. More specifically, its proponents argue that the stigma attached to a criminal conviction communicates a message of moral condemnation, degrading the offender's social status, and essentially exiling him from the community.¹⁵⁷ Civil proceedings, on the other hand, do not typically carry such stigma. No criminal record is established and, theoretically at least, people are less likely to associate serious intentional offenses with the imposition of remedial sanctions.¹⁵⁸

Similarly, sanctions that serve a primarily compensatory function are more frequently viewed as remedial rather than criminal.¹⁵⁹ In this view, if the sanction is authorized in order to compensate for damages or loss, it is not criminal, but if suit can be brought to punish the defendant, the sanction is criminal.¹⁶⁰ The classic example of this reasoning is the contrast drawn between tort law and criminal law. Specifically, in this view, the function of the criminal law is to protect the public from harm through punishment. Tort law, on the other hand, seeks to compensate a person for injuries. Similarly, the state brings

(1958). See also *In re Gault*, 387 U.S. 1, 24 (1967) (holding that stigma attached to conviction of juvenile defendant entitled him to the procedural protections normally afforded adult criminal defendant); Clark, *supra* note 144, at 406-07.

¹⁵⁷ Griffiths, *Ideology in Criminal Procedure*, 79 YALE L.J. 359, 385-86 (1970).

¹⁵⁸ Clark, *supra* note 144, at 407. Professor Clark states succinctly that "most people see in civil penalties an element of deterrence, but not a very strong element of retribution or moral condemnation." *Id.*

¹⁵⁹ See, e.g., *Ward*, 448 U.S. at 242. In *Ward*, the Court relied heavily on the fact that the penalties in question were very analogous to traditional civil damages. Specifically, the Court observed that the penalties involved were imposed for water pollution, and that they bore a correlation to the damages sustained by society and to the cost of enforcing the law. *Id.* at 254.

¹⁶⁰ Charney, *supra* note 17, at 497; W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972). This position has also received some support from case law. In an 1832 action, the Supreme Court of Massachusetts stated that the basic purpose for the civil proceeding is remedial because the action is brought by an injured party seeking compensation for a wrong inflicted upon him. *Reed v. Northfield*, 30 Mass. (13 Pick.) 94, 100-01 (1832) ("All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that [the criminal suit] is prosecuted for the purpose of punishment, and to deter others from offending in like manner."). *Id.*

criminal proceedings to protect the public, but they have no compensatory function. A tort suit, by way of contrast, is brought by the injured party himself, seeking to recover damages.¹⁶¹

Finally, courts have occasionally relied upon the position that criminal sanctions are reserved for offenses against the authority of the state. Support for this position can be found as early as 1892 when the Supreme Court stated that "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the state."¹⁶² More recently, in *Morrisette v. United States*,¹⁶³ the Court defined criminal laws in terms of "offenses against [the state's] authority."¹⁶⁴ The usefulness of this particular standard is, however, severely limited by its breadth. That is, while "offenses against the authority of the state"¹⁶⁵ surely includes all criminal acts, it also encompasses many actions that are clearly civil. The governments of most states, for example, have imposed an implied warranty of merchantability through the promulgation of the Uniform Commercial Code.¹⁶⁶ Breach of

¹⁶¹ W. LAFAVE & A. SCOTT, *supra* note 161, at 11. The fact that the state is the plaintiff in criminal actions has also been considered as a factor in the determination. It is not, however, dispositive.

In *United States v. Shapleigh*, 54 F. 126, 129 (8th Cir. 1893), for example, the court partially attributed the government's greater burden of proof in criminal trials to the relative position of the parties in power, situation, and advantage. *Id.*

The usefulness of this theory is limited, however, by the fact that the same considerations of relative power are present in actions brought by the government to enforce civil sanctions. Furthermore, it would preclude the classification of privately-brought criminal actions such as suits for punitive damages and the *qui tam* action by an informer as criminal. Charney, *supra* note 17, at 505-06, 506 n.152. For an example of the *qui tam* action, see *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F.Supp. 412 (D. Ala. 1971).

¹⁶² *Huntington v. Attrill*, 146 U.S. 657, 667 (1892).

¹⁶³ 342 U.S. 246 (1952).

¹⁶⁴ *Id.* at 256. Speaking of criminal prosecutions for "public welfare offenses," the Court stated that "[w]hile such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order" *Id.* Significantly, the Court explicitly included violations of traffic statutes and regulations in its discussion of such offenses. *Id.* at 254.

¹⁶⁵ Charney, *supra* note 17, at 496.

¹⁶⁶ See U.C.C. § 2-314 (1977).

this warranty, therefore, could be construed as an offense against the authority of the state. It is doubtful, however, that many courts would consider it a criminal act.¹⁶⁷

C. *Quasi-Criminal Proceedings*

In addition to the extensive case law and commentary discussing the indicia of the criminal sanction, the Supreme Court has also enunciated the doctrine of the "quasi-criminal" proceeding.¹⁶⁸ In a long line of cases, the Court has made clear that particular penalties, although civil for all other purposes, are criminal with regard to the fifth amendment.¹⁶⁹ Therefore, the "quasi-criminal" defendant is entitled to the protection of the defendant's fifth amendment privilege.¹⁷⁰

This view originated in the 1886 case of *Boyd v. United States*.¹⁷¹ Therein, the United States instituted forfeiture proceedings against fraudulently imported property. During the course of pre-trial discovery, the government subpoenaed from Boyd various books and records relating to the property. Boyd resisted the subpoena by invoking the fifth amendment and arguing that production would incriminate him. The government answered that the proceedings were not criminal and therefore, the defendant's privilege did not apply.¹⁷²

The Supreme Court held for Boyd.¹⁷³ In an opinion that has been described as "unfortunate,"¹⁷⁴ severely limited,¹⁷⁵ and "muddying the legal waters,"¹⁷⁶ Justice Brad-

¹⁶⁷ Charney, *supra* note 17, at 496-97.

¹⁶⁸ *Boyd*, 116 U.S. at 633-34.

¹⁶⁹ See, e.g., *Ward*, 448 U.S. at 251; *United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *Boyd*, 116 U.S. at 633-34.

¹⁷⁰ *Clark*, *supra* note 144, at 418-19. The theoretical justifications for the view that the fifth amendment privileges are broader than other constitutional safeguards are discussed *infra*, notes 181 - 187 and accompanying text.

¹⁷¹ 116 U.S. 616 (1886).

¹⁷² *Id.* at 617-18.

¹⁷³ *Id.* at 638.

¹⁷⁴ *Clark*, *supra* note 144, at 416.

¹⁷⁵ *Ward*, 448 U.S. at 253; see also *United States v. Regan*, 232 U.S. 37 (1914) (declining to classify forfeitures as criminal for constitutional purposes other than the fifth amendment).

ley announced the principle of the quasi-criminal proceeding. He stated that certain proceedings, although civil in form, are criminal for purposes of the fifth amendment.¹⁷⁷ He reasoned that the offense underlying the forfeiture was in fact a criminal act. Therefore, if an indictment had been presented against Boyd, he could have been convicted and subjected to fines and imprisonment. In the criminal proceeding, he would have been entitled to the full gamut of constitutional protections. Therefore, the court concluded, the protection of the fifth amendment must be extended to defendants in proceedings for the infliction of "penalties and forfeitures."¹⁷⁸ The Court specifically rejected the notion that the government could effectively dictate the rights of the defendant by its election of the form of the proceeding.¹⁷⁹

The Court has never developed a principled explanation of why identical sanctions should trigger certain criminal constitutional safeguards but not others.¹⁸⁰ Simi-

¹⁷⁶ Clark, *supra* note 144, at 414.

¹⁷⁷ *Boyd*, 116 U.S. at 633-34. Justice Bradley stated,

We are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they be civil in form, are in their nature criminal. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings . . . and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself

Id.

¹⁷⁸ *Id.* The court stated:

As therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature we think that they are within the reason of criminal proceedings for purposes of . . . that portion of the [f]ifth [a]mendment which declares that no man shall be compelled in any criminal case to be a witness against himself.

Id.

¹⁷⁹ *Id.* at 634. Rhetorically, Justice Bradley asked, "If the government prosecutor elects to waive an indictment and to file a civil information against the [defendant] . . . can he by this device take from the proceeding its criminal aspect and deprive the [defendant] of [his] immunities as [a] citizen?" *Id.* Without hesitation, he answered, "This cannot be." *Id.*

¹⁸⁰ Clark, *supra* note 144, at 414-20. Drawing on numerous decisions of the

larly, it has never effectively explained or established the precise parameters of the quasi-criminal doctrine.¹⁸¹ In *Helvering v. Mitchell*,¹⁸² the Court suggested that certain constitutional protections are simply "broader" than others.¹⁸³ This explanation, however, merely recognized that the policy motivations behind the various safeguards are different and that they therefore command different treatment and application. As one scholar has noted, because the Court was "armed with its facile 'quasi-criminal' label, [it] did not feel the need to explain what those principles are and why they differ."¹⁸⁴

Commentators have explained *Boyd* as a product of the Court's intuitive feeling that the compulsion of testimony in a forfeiture proceeding is, at a minimum, unfair, and at its worst, unconstitutional.¹⁸⁵ This notion is based not on

Supreme Court, Professor Clark has suggested that the Court's analysis is most accurately explained as hinging on the punitive nature of the sanction rather than the criminal-civil distinction. In his view, the Court's analysis can be reduced to the principle that all criminal sanctions are necessarily punitive but not all punitive sanctions are criminal. Rather than considering the *Boyd* forfeiture proceedings as civil in form but punitive in nature and effect (i.e. quasi-criminal), Clark would refer to it as punitive and non-criminal. *Id.*

In Clark's scheme, certain "broader" constitutional safeguards, including both the defendant's and the witness' fifth amendment privileges, are available in all cases involving punitive sanctions, whether they are civil or criminal in form. Other protections, for example the double jeopardy clause, apply only if the proceedings are "criminal" and by definition, punitive. Thus, under Clark's interpretation, the *Boyd* forfeitures are not criminal and therefore not subject to all the procedural safeguards of criminal due process; however, they are punitive. Therefore, the defendant is entitled to the broader constitutional safeguards such as the self-incrimination privilege. *Id.*

¹⁸¹ The Fifth Circuit, for example, has held that proceedings are quasi-criminal "when a central issue in a case is 'close to one of a criminal nature.'" *Carson v. Polley*, 689 F.2d 562, 575 (5th Cir. 1982) (quoting *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir. 1982))(emphasis added).

¹⁸² 303 U.S. 391 (1938).

¹⁸³ 303 U.S. at 400 n.3 (quoting *Regan*, 232 U.S. at 50).

¹⁸⁴ Clark, *supra* note 144, at 419. Professor Clark also suggests that "[p]erhaps the chief gain from removing the 'quasi-criminal' rationale would be to force the Court to elaborate the rationale that is, in fact, its ground for decision." *Id.* at 419-20.

¹⁸⁵ *Id.*, at 414-20. Professor Clark also rejects two alternative explanations as unsatisfactory. First, he dismisses the notion that the court viewed the case as an instance of the government using the threat of forfeiture to coerce Boyd to disclose testimony that could be used against him in a later criminal trial. He further

the criminal nature of the proceeding but on its punitive effect. That is, while the consequences of a noncriminal punitive proceeding are not the traditional criminal sanctions of imprisonment or pillory, the state is nonetheless seeking retribution for a legal transgression. As a result, the proceedings raise many of the same concerns that underlie the application of the self-incrimination clause in criminal proceedings. They evoke, for example, concern that oppressive tactics will be used to secure testimony and that such testimony will be unreliable.¹⁸⁶

V. APPLICATION TO AIR LAW CASES

A. *Refusal of Fifth Amendment Privileges*

In applying these tenets to pilot disciplinary proceedings, courts have shown a reluctance to extend the defendant's fifth amendment privilege against self-incrimination to airmen. They have refused to classify the proceedings as criminal or quasi-criminal.¹⁸⁷ These courts conclude that, in establishing pilot disciplinary sanctions, the legislature intended a civil penalty, and that certificate actions are not "sufficiently punitive in their nature and effect" to overcome this congressional preference.¹⁸⁸ Moreover, at least one court has refused to

observes that the Court has held that incriminating testimony may not be coerced by the threatened revocation of a professional license. *Id.*; see, e.g., *Spevack v. Klein*, 385 U.S. 511 (1967). He also rejects the view that the case was decided on lack of probable cause grounds. Such explanations, he concludes, do not reflect the true spirit of the opinion. Furthermore, the *Boyd* court does not advert to either future criminal prosecutions or lack of probable cause. *Clark, supra* note 144, at 414-17.

¹⁸⁶ *Clark, supra* note 144, at 417. Similarly, denial of the privilege in noncriminal punitive proceedings offends the basic notion that alternative, less intrusive means should be preferred, and it threatens the adversarial nature of the adjudicatory process. *Id.*

¹⁸⁷ See, e.g., *Air East, Inc. v. NTSB*, 512 F.2d 1227, 1234 n.17 (3d Cir. 1975). The court noted in passing that "[t]here is a difference of opinion as to whether the enforcement proceedings are intended to be remedial or punitive in nature." *Id.* (citing *Sabinske v. Civil Aeronautics Bd.*, 346 F.2d 142 (5th Cir. 1965); *Nadiak v. Civil Aeronautics Bd.* 305 F.2d 588 (5th Cir. 1962); *Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349 (1st Cir. 1962)).

¹⁸⁸ See, e.g., *Nadiak*, 305 F.2d at 590 n.1. In *Nadiak*, the court took the position

extend the witness' privilege to a pilot in a decertification action.¹⁸⁹

B. Roach v. National Transportation Safety Board

In *Roach v. National Transportation Safety Board*,¹⁹⁰ the United States Court of Appeals for the Tenth Circuit rejected a pilot's attempt to invoke his fifth amendment privilege against self-incrimination in a license suspension proceeding.¹⁹¹ Roach, president of Roach Aircraft Company of Colorado, had compiled over 20,000 hours of flight time, and had never been previously cited for violation of any FAA regulations. In November, 1980, Roach and an assistant flew a Piper Aerostar 601P from Denver to LaJunta, Colorado to demonstrate the plane for potential buyers. After the demonstration, Roach and his assistant left LaJunta airport for the return to Denver. Before leaving the immediate vicinity of the airport for the return to Denver, Roach made three passes over the runway at an altitude of approximately 500 feet to allow his customers to see the plane in flight. At the end of the third pass he executed a 360 degree aileron roll.¹⁹²

After a preliminary investigation by the FAA, officials alleged that Roach had violated Section 91.79(c)¹⁹³ of the Federal Aviation Regulations prohibiting the operation of an aircraft less than 500 feet above the ground and within 500 feet of surface structures; Section 91.31(a)¹⁹⁴ prohibiting the operation of an aircraft without compliance with its operating limitations; Section 91.15(c)¹⁹⁵ proscribing the intentional execution of a maneuver exceeding a bank of 60 degrees relative to the horizon unless all non-

that "it is public safety, and not punishment, which undergirds the whole statutory scheme." *Id.*

¹⁸⁹ *Roach v. NTSB*, 804 F.2d 1147, 1155 (10th Cir. 1986), *cert. denied* 486 U.S. 1006 (1988).

¹⁹⁰ *Id.* at 1147.

¹⁹¹ *Id.* at 1155.

¹⁹² *Id.* at 1149.

¹⁹³ Federal Aviation Regulations, 14 C.F.R. § 91.79(c) (1990).

¹⁹⁴ 14 C.F.R. § 91.31(a).

¹⁹⁵ 14 C.F.R. § 91.15(c)(1).

crewmembers aboard the aircraft are wearing parachutes; and Section 91.9¹⁹⁶ prohibiting the operation of an aircraft in a reckless manner so as to endanger the life or property of another.¹⁹⁷

The investigators recommended a civil fine of \$500. The Administrator, however, issued a Notice of Proposed Certificate Action, calling for the suspension of Roach's commercial license for 120 days. Roach and his attorney met with the Administrator in an informal conference and succeeded in having the suspension reduced to 60 days. The order of suspension subsequently found Roach guilty of all four alleged violations.¹⁹⁸

On motion by Roach, an ALJ conducted a de novo review.¹⁹⁹ During the proceedings, the ALJ allowed the Administrator to call Roach as an adverse witness. Roach objected, arguing that he was entitled to the fifth amendment privilege against self-incrimination. The ALJ overruled the objection, and on examination, Roach admitted that he had executed the aileron roll and that he and his assistant were not wearing parachutes at the time. He also admitted that the Aerostar's operating instructions did not authorize such acrobatic maneuvers.²⁰⁰ Based on this testimony and the record of the proceedings below, the ALJ found that Roach violated the operating instructions of the plane; that he operated the craft in a reckless manner; and that he executed a maneuver exceeding 60 degrees while his non-crewmembers were not wearing parachutes.²⁰¹ In light of Roach's long history in aviation, however, the ALJ reduced the suspension to 30 days.²⁰² The NTSB affirmed this judgment, and Roach appealed to the Tenth Circuit Court of Appeals for relief.²⁰³

¹⁹⁶ 14 C.F.R. § 91.9.

¹⁹⁷ *Roach*, 804 F.2d at 1150.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1152.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

The appeals court upheld the suspension.²⁰⁴ Moreover, the court specifically rejected Roach's fifth amendment claims, holding that the defendant's privilege was inapplicable because the proceedings were neither criminal nor "quasi-criminal." As for the witness' privilege, the court found that Roach made no attempt to invoke it,²⁰⁵ and that in any event, Roach presented no evidence on which the court could find that his testimony presented any reasonable apprehension of future criminal prosecution.²⁰⁶

In concluding that the sanctions were not criminal, the court looked first to legislative intent and the statutory construction test. It found that Congress did not intend certificate actions to be punitive and that therefore, they were not criminal. The court noted that the Act provided for the imposition of criminal penalties in a separate section and that that section expressly excluded violations of the safety regulations at issue.²⁰⁷

The court conceded that the sanction furthered the traditionally criminal goals of retribution and deterrence;

²⁰⁴ *Id.* at 1160-61.

²⁰⁵ *Roach*, 804 F.2d at 1152. The court noted that Roach's only attempt at invoking the self-incrimination privilege was his objection to being called to the stand and that thereafter he cooperated by answering all questions. *Id.* Such a one-time objection, the court held, can only be interpreted as an attempt to invoke the defendant's right. To hold otherwise would "deny to the judge the specifics needed to determine the privilege's applicability to each question, as well as a record on which appellate courts could review that determination." *Id.* at 1152 n. 5. Therefore, it is insufficient to invoke the witness' privilege. Instead, the witness must object to each potentially incriminating question as it is asked. *Id.*

²⁰⁶ *Id.* at 1152 n.5. The court did note, however, that "some [s]tates have made reckless operation of an aircraft a crime," and that in fact, one of those states is Colorado. The court held, however, that Roach "presented no facts as to whether such prosecution is likely or even possible on the basis of the statements he made at the hearing." *Id.* Interestingly, the court did not cite the *Hoffman* holding that a fifth amendment claim is invalid only when it is "perfectly clear . . . that the answer[s] cannot possibly have a tendency to incriminate." See *United States v. Hoffman*, 341 U.S. at 479, 486 (1951).

²⁰⁷ *Roach*, 804 F.2d at 1153. 49 U.S.C. § 1472 provides criminal penalties for individuals "knowingly and willingly violating any of the provisions of this chapter (except for subchapters III, V, VI, and XII) . . . for which no penalty is otherwise provided in the section or subsection 1474 of this title." 49 U.S.C. app. § 1472(a) (1988). The statute further provides that violators shall be guilty of a misdemeanor, and subject to a fine of up to \$500 for a first offense and \$2,000 for subsequent convictions. *Id.*

however, it gave this factor little weight. It noted that the sanction was a public safety measure and that the deterrent and retributive effect of the suspension was similar to the impact of other civil sanctions. A certain amount of retribution and deterrence, the court noted, is found in most civil penalties. Therefore, the court held, this factor cannot be dispositive. The court concluded that in view of these various factors, the suspension did not serve a "clearly penal purpose or effect" and that "Roach did not need to be afforded the protections given a defendant in a criminal trial at his hearing."²⁰⁸

Furthermore, the court refused to find the effect of the sanction so punitive as to negate the intent of the legislature. Specifically, the court noted that the action was not an affirmative restraint but only the "revocation of a privilege conditioned on compliance with the safety regulations of the FAA."²⁰⁹ Similarly, the court focused on the fact that the safety regulations in question did not require a finding of scienter, and it concluded that the sanction was not excessive in relation to its public safety objective.²¹⁰

VI. THE CASE FOR THE EXTENSION OF FIFTH AMENDMENT PRIVILEGES TO PILOTS FACING DECERTIFICATION

A. Introduction

While the reasoning of the *Roach* court is typical of the approach taken by courts throughout the country, it is not the exclusive view. In fact, there is a difference of opinion over whether the enforcement provisions of the Act are remedial or punitive in their nature.²¹¹ In addition, commentators have not been reluctant to question the distinction between criminal and civil sanctions in general.²¹²

²⁰⁸ *Roach*, 804 F.2d at 1154.

²⁰⁹ *Id.* at 1153-54.

²¹⁰ *Id.* at 1154.

²¹¹ *Air East, Inc. v. NTSB*, 512 F.2d 1227, 1234 n.17 (3d Cir. 1975).

²¹² See, e.g., Clark, *supra* note 144, at 379; Charney, *supra* note 17, at 478; Note,

The following discussion draws from the decisions of other courts and focuses on the arguments raised by the commentators in favor of granting fifth amendment privileges to pilots facing delicensure proceedings.

B. *Decertification Is a Criminal Sanction*

1. *The Traditional View*

Confining the discussion to the traditional framework of analysis, the strongest argument in favor of extending the self-incrimination privilege in certificate actions is that decertification and suspension are often purely punitive sanctions. For example, the FAA has fought vigorously in defense of its power to impose suspensions unrelated to any technical deficiency or incompetence on the part of the pilot.²¹³ In upholding the FAA's position, courts have explicitly noted that such sanctions are for purely "disciplinary purposes."²¹⁴

Because all punitive sanctions are criminal, it follows that the fifth amendment should be available in such cases.

In *Pangburn v Civil Aeronautics Board*²¹⁵ the First Circuit considered this issue in the context of a 90 day suspension order. The investigation surrounded the crash of a plane piloted by Pangburn at New York's La Guardia Airport on September 14, 1960. At the informal hearing, Pangburn contended that the accident was not a result of pilot negligence but of an unforeseeable downdraft, or "thermal sink," which caused the plane to descend abruptly. The Administrator rejected this position, concluding that Pangburn had failed to exercise appropriate care, skill, judgment, and responsibility, and suspended his commer-

Punishment: Its Meaning in Relation to Separation of Powers and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez and Speiser Cases, 34 IND. L.J. 231 (1959); Note, *Statutory Penalties — A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938).

²¹³ See, e.g., *Go Leasing, Inc. v. NTSB*, 800 F.2d 1514, 1519 (9th Cir. 1986); *Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349, 354-55 (1st Cir. 1962).

²¹⁴ *Go Leasing*, 800 F.2d at 1519.

²¹⁵ 311 F.2d 349 (1st Cir. 1962).

cial pilot's license for 90 days.²¹⁶ The NTSB affirmed the order, and Pangburn appealed to the federal court.²¹⁷

In affirming the order of suspension, the court noted that the suspension bore no relation to the qualification of the pilot. The court specifically held that the government may order suspension for disciplinary purposes as a sanction against reckless conduct because of its deterrent value to both the offender and others similarly situated.²¹⁸ In reaching this conclusion, the court noted that its review of the legislative history of the Act revealed no congressional intention to place any limits on the circumstances under which the government may impose such suspensions. The court also held that because the purpose of the Act is to promote public safety in air transport and air commerce, it would be illogical to limit the power of suspension to cases of pilot incompetence.²¹⁹

Moreover, the sanction's concurrent impact on public safety should not disguise its primarily punitive nature. In such circumstances, the courts must ascertain the "dominant purpose" of the sanction.²²⁰ The essence of punishment, for example, is a dominant purpose of retribution and deterrence.²²¹ It inflicts hurt on a violator for no reason other than revenge or the desire to influence his future conduct.²²² Suspensions and revocations unrelated to technical proficiency are therefore essentially punitive. They are intended to deter the pilot from future

²¹⁶ *Id.* at 351.

²¹⁷ *Id.*

²¹⁸ *Id.* at 354.

²¹⁹ *Id.* at 352-55.

²²⁰ Clark, *supra* note 144, at 435-36. Professor Clark suggests that the court may attempt to discern such a purpose either through an inquiry into legislative history or a rebuttable presumption based on the effects of a given sanction. He adopts the latter approach, calling it a "search for purpose pure and simple," and rejects the idea of a dominant purpose altogether. *Id.* at 436. He concludes that such a dominant purpose inquiry is merely an inaccurate attempt to discern the "purpose that was uppermost or dominant in the group psyche of the legislature at the time the statute was enacted." *Id.*

²²¹ H. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 31 (1968).

²²² H. HART, *supra* note 221, at 4-5; H. PACKER, *supra* note 221, at 31.

transgressions and to punish him for past offenses.²²³

Logically, any conclusion in this regard must remain flexible to the extent it excludes the secondary effects of a given sanction. Inevitably, every sanction entails some indirect impact. For instance, incarceration is a clear example of pure punishment. It inflicts injury on lawbreakers as revenge and deters them and others from performing similar actions in the future. It also, however, performs an important public protection function by disabling the offender from harming the public in the future. In this view, the sanction's primary objective is punishment, yet it contains the strong remedial element of public protection.

A much more difficult analysis is presented by sanctions whose ostensible purpose is regulation and public safety.²²⁴ A context closely analogous to the FAA proceedings, for example, is the driver's license suspension of an individual convicted of negligent driving.²²⁵ This sanction serves both to deter future offenses and to punish and incapacitate the offender. Its primary purpose is regulatory, the protection of the public from dangerous drivers; however, it also provides a strong measure of retribution and deterrence. Because it effectuates a significant punitive end, the sanction is punitive unless there exists an alternative purpose rationally related to a legitimate end.²²⁶ Furthermore, if punishment is a sanction's

²²³ Clark, *supra* note 144, at 385. Professor Clark postulates that punitive sanctions seek retribution and/or deterrence. He analogizes the search for a dominant purpose in this context to that for a dominant purpose to "discriminate invidiously" under the equal protection clause or the first amendment. *Id.* If the law places special burdens on a group of persons who have violated some legal prohibition, he concludes, there should be a presumption that the sanction is punitive unless there is convincing evidence of some alternative purpose. *Id.* See *infra* notes 288 - 293 and accompanying text.

²²⁴ Clark, *supra* note 144, at 475-89. Professor Clark notes that this is perhaps the most difficult context in which to attempt the punitive/non-punitive distinction. *Id.* at 475.

²²⁵ *Id.* at 482-83.

²²⁶ Grass, *supra* note 155, at 297. For an example of an extreme case in which the court strained to find such a rational relationship, see *Skinner v. State*, 115 P.2d 123 (Okla. 1941), *rev'd on other grounds*, 316 U.S. 535 (1942). In that case, the

primary goal, no assertion of an alternative purpose or corresponding relationship will alter the sanction's essentially penal nature.²²⁷ "Retribution and deterrence," the Supreme Court has stated, "are not legitimate, nonpunitive governmental objectives."²²⁸

One argument proffered in support of the view that license suspension is not a punitive sanction is that licenses are denied to all persons who are unfit to drive.²²⁹ Persons convicted of negligent driving, therefore, constitute only a subclass of all those who are unfit. Therefore, the sanction is not limited to persons convicted of forbidden acts and is not punitive in its application.²³⁰ This view, however, depends heavily on the ability of the legislature to establish a rational causal link between the accident or incident at issue and a proclivity for accidents in general.²³¹ Absent evidence that suspension will reduce this dangerous tendency when the driver returns to the road, the restoration of the license belies any ostensible desire to prevent harm. In fact, it suggests a punitive purpose.²³² Any improvement in driving skills attributed to the suspension period in actuality results from an increased fear of future suspension. This improvement then, is a clear result of deterrence and hence, punishment.²³³

Pilot decertification may be similarly analyzed. The

court held that state imposed sterilization of habitual offenders was not a punitive sanction because it was intended as "a eugenic measure to improve the safety and general welfare of the race by preventing from being born persons who will *probably* become criminals." *Id.* at 126 (emphasis added). In fairness to the Oklahoma court, subsequent commentators have noted that there was a disagreement among scientists at this time regarding whether criminality was an hereditary feature. G. STONE, CONSTITUTIONAL LAW 754 (1986). *See also* W. HEALY, THE INDIVIDUAL DELINQUENT 188-89 (1915)(criminality is closely related to inherited features); D. SUTHERLAND, PRINCIPLES OF CRIMINALITY 90 (4th ed. 1947)(no such thing as a born criminal).

²²⁷ *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).

²²⁸ *Id.*

²²⁹ *Clark, supra* note 144, at 482.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 483.

sanction's primary impact in such circumstances is as a punitive, disciplinary penalty intended to punish the offending pilot. The sanction performs an important regulatory role in protecting the public safety, but that role is clearly secondary. For example, a remedial sanction is "imposed until such time as the offending carrier or air agency has cured its defective equipment, procedures, or staffing to such an extent as to assure safe operations."²³⁴ There is no evidence, however, that previously suspended pilots are less likely to be reckless or negligent in future operations. Any such likelihood can be attributed primarily to the deterrent effect of the previous suspension. The FAA and the courts have openly admitted that many certificate actions are unrelated to the pilot's qualifications and undertaken only to punish transgressions.²³⁵ This is not a "legitimate, nonpunitive governmental objective."²³⁶ Therefore, the suspension of a pilot's certificate is punitive despite its concurrent impact on public safety. At least one federal judge has already reached this conclusion, stating that a complaint alleging that the pilot was "careless" and ought therefore to be suspended without regard to his qualifications was "purely punitive."²³⁷

In *United States v. One Assortment of 89 Firearms*²³⁸ however, the United States Supreme Court rejected a similar argument in a non-air law context. In that case, the defendant faced charges of dealing in firearms without a license. The district court acquitted him, and the government instituted forfeiture proceedings against the firearms. The district court granted forfeiture, but the appellate court reversed, holding that the forfeiture proceeding was criminal in nature and therefore barred by

²³⁴ *Go Leasing*, 800 F.2d at 1519; see also *Pike v. Civil Aeronautics Bd.*, 303 F.2d 353, 358 (8th Cir. 1962) (revocation of a pilot's license on grounds that the defendant was not qualified is "primarily remedial").

²³⁵ See, e.g., *Go Leasing*, 800 F.2d at 1519.

²³⁶ *Bell*, 441 U.S. at 539 n.20.

²³⁷ *Lee v. Civil Aeronautics Bd.*, 225 F.2d 950, 953 (D.C. Cir. 1955) (Prettyman, J., dissenting).

²³⁸ 465 U.S. 354 (1984).

the double jeopardy clause of the fifth amendment. In an opinion by the Chief Justice, the Supreme Court reversed, holding that the forfeiture proceedings were remedial and civil in nature.²³⁹

Applying the *Ward* tests, the Court specifically relied on the fact that the statute in question "furthers broad remedial aims."²⁴⁰ In enacting the statute, the Court noted, Congress was concerned with the widespread traffic and availability of firearms and intended to limit the number of firearms in the hands of those "whose possession thereof was contrary to the public interest."²⁴¹ Thus, the statute's primary role was remedial, controlling the proliferation of firearms. "Keeping potentially dangerous weapons out of the hands of unlicensed dealers," the Court concluded, "is a goal plainly more remedial than punitive."²⁴²

The *89 Firearms* case, however, is distinguishable from pilot disciplinary proceedings. First, the *89 Firearms* case was plainly in rem rather than in personam.²⁴³ Cases directed against property rather than individuals are traditionally considered civil on the theory that the property itself is the offender rather than the individual.²⁴⁴ By contrast, there is no question but that the pilot is the subject of the delicensure sanction. The cases would be analogous only if, for example, the FAA sought the forfeiture of the plane.

Furthermore, conceding for the moment that the essence of the punitive sanction is a punitive legislative intent,²⁴⁵ the courts' reliance on legislative history as an

²³⁹ *Id.* at 366.

²⁴⁰ *Id.* at 364.

²⁴¹ *Id.* (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974)).

²⁴² *Id.*

²⁴³ I.R.C. § 7323 (1988). Section 7323 provides that an action to enforce a forfeiture "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made." *Id.*; see also *89 Firearms*, 465 U.S. at 363.

²⁴⁴ *Id.*; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); Comment, *Forfeitures — Civil or Criminal?*, 43 TEMP. L.Q. 191, 192 (1970).

²⁴⁵ Clark, *supra* note 144, at 437. Clark also notes that this notion of punish-

indicator of intent is inappropriate.²⁴⁶ In fact, the Supreme Court has expressly rejected this line of analysis in all other contexts.²⁴⁷ Moreover, one commentator has termed it a "gross abdication of the judicial role,"²⁴⁸ and, in the words of another scholar, a "decision based on legislative labels can hardly be termed 'judicial review.'"²⁴⁹ The criticism of this approach focuses on several issues.²⁵⁰ First of all, it is unlikely that there ever exists a consensus in Congress for the passage of an act.²⁵¹ The legislature has no independent consciousness, existing only as an aggregate of individuals. Each legislator supports every bill for his own political and personal reasons.²⁵² Additionally, a legislator may entertain more than one reason for supporting a bill, and in any event, the executive's motives in signing a bill into law may reflect intentions and

ment is consistent with the common sense perception. "[W]e sense a sharp difference," he notes, in "being shoved in anger and being shoved out of the way of an oncoming truck." *Id.* (citing O. HOLMES, *THE COMMON LAW* 7 (1881)). It is the sincerity or animus of the actor to which we react. Where, as is often the case in pilot disciplinary proceedings, there are alternative purposes to the "shove," people become ambivalent, and attempt to determine the other person's "true intent." Thus, under this view, whether a sanction is punitive depends on the motivation or dominant purpose of the party who inflicts the sanction. *Id.* at 438.

²⁴⁶ *Id.* at 438. It has been noted that in the arena of regulatory agencies such as the FAA a great degree of judicial deference to the agency's intentions is appropriate; however, even this commentator is quick to add that "[u]nquestionably, a regulation can be invalidated if it is unconstitutional. . . ." Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681, 686 (1984).

²⁴⁷ See, e.g., *Bell*, 441 U.S. at 584 ("[T]he Court may not point to the difficulty of the task as a justification for confining the scope of the punishment concept so narrowly that it effectively abdicates . . . the judicial responsibility to enforce the guarantees of due process."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (refusing to speculate as to whether the intent of Congress in prohibiting the burning of draft cards was to suppress freedom of speech); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (noting that inquiries into legislative motives are "hazardous" at best); see also Charney, *supra* note 17, at 492-94; Clark, *supra* note 144, at 384, 436-44.

²⁴⁸ Charney, *supra* note 17, at 494.

²⁴⁹ Note, *Constitutional Law — Expatriation of Draft Evaders*, 37 TUL. L. REV. 831, 834 (1963); see also *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (rejecting reliance on congressional labels).

²⁵⁰ Clark, *supra* note 144, at 441-44.

²⁵¹ *Id.* at 441.

²⁵² *Id.*

concerns wholly apart from those intended by the legislature.²⁵³

Furthermore, assuming that a consensus could be determined as to purpose, the historical record is inherently suspect.²⁵⁴ For instance, committee reports and floor debates are highly political.²⁵⁵ They necessarily rely on the words of only a few members of the legislature. Therefore, much legislative history is made by individual congressmen or small groups of individuals interested in specific legislation rather than by Congress as a whole.²⁵⁶ Furthermore, this degree of legislative intent may be beyond discovery with respect to state legislatures.²⁵⁷

There is also a certain degree of futility in striking down a law based on an improper motive in the legislature.²⁵⁸ There is, presumably, nothing to prevent Congress from passing the act a second time, while recording its proper motives in the form of the floor debates and committee reports to insulate it from annulment by the Court.²⁵⁹ Furthermore, to strike down a law on such ground would be "to merely chasten legislative immorality"²⁶⁰ and to demean the dignity of a coordinate branch by inquiring into its motives.²⁶¹

Thus, while on its face such an inquiry appears to be a

²⁵³ *Id.* at 441-42.

²⁵⁴ *Id.* at 443.

²⁵⁵ *Id.*

²⁵⁶ *Id.*; see also Kohler, *Judicial Interpretation of Enacted Law*, 9 MOD. LEGAL PHIL. SERIES 187 (1917) ("Surely it would be a strange method of interpretation by which the validity of a law depended on some parliamentarian's state of digestion."); Note, *supra* note 249, at 834 ("[I]t is questionable whether the penal or regulatory character of an act should turn on the color it acquires as a result of congressional debate.").

²⁵⁷ Clark, *supra* note 144, at 441-42.

²⁵⁸ *Id.*; see, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters.").

²⁵⁹ Clark, *supra* note 144, at 441-42; see also, *Palmer*, 403 U.S. at 217 (if a law is struck down for a bad motive, it would presumably be valid as soon as the legislature repassed it for different reasons).

²⁶⁰ Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 360 (1949).

²⁶¹ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 215 (1962).

concerted effort between the legislative and judicial branches, it avoids the broader and more important issue of whether the legislation has exceeded its constitutional bounds. The Court should determine, independently of Congress, when and to what extent constitutional protections are available to defendants. There is no need for blind acceptance of a Congressional label. The Court itself has explicitly rejected such reasoning in other contexts.²⁶² In the arena of regulatory sanctions however, the Court has insisted that only the "clearest proof" of punitive effect will suffice to override a perceived remedial intent in Congress.²⁶³

Moreover, while both *89 Firearms* and the pilot disciplinary proceedings involve the forfeiture of property interests, the qualitative difference in the nature of those interests distinguishes the cases.²⁶⁴ Specifically, the pilot's certificate rights have a broad social value, while the illegal firearms are merely contraband. Unregistered fire-

²⁶² *Trop*, 356 U.S. at 94 ("How simple would be the task of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them!")(exclamation in original).

²⁶³ See, e.g., *United States v. Ward*, 448 U.S. at 242, 249 (1980).

²⁶⁴ See Comment, *supra* note 244, at 191. By way of example, the author suggests that if an individual is apprehended in an automobile while transporting heroin, the government will seize both the car and the drugs. Under this view, the automobile is beneficial property, and the drugs are inherently dangerous. Seizure of the drugs is clearly remedial and civil in nature. Seizure of the automobile, on the other hand is best characterized as punishment of the possessor for the criminal act of transporting heroin. Therefore, in challenging the right of the government to seize his automobile, the possessor should be entitled to the procedural safeguards of criminal due process. *Id.* at 195.

This position is also consistent with the view that the government should not be allowed to seize the property of an individual and then demand that he prove ownership by a preponderance of the evidence in order to get it back. While this may be acceptable in the cases of inherently dangerous articles which the government seeks to remove from private control, it is deplorable with regard to such beneficial property as automobiles and personalty. Such takings are punitive, directed at the defendant personally, and he is entitled to the safeguards of due process. Specifically, the government should be under a higher standard of proof, and there should be a conviction prior to any forfeiture. *Id.*

Logically, then, because the protection of the fifth amendment is "broader" than that of the other constitutional guaranties, the defendant should be privileged from self incrimination. See, e.g., *United States v. Regan*, 232 U.S. 37 (1914).

arms are inherently dangerous and of only limited social value.²⁶⁵ The FAA proceedings are not in rem because the property is not the offender. In fact, the pilot is the offender and the sanctions are primarily intended to punish him for his transgression. Accordingly, they should be considered punitive and by extension, criminal. Thus, the defendant's fifth amendment privilege should be available in FAA proceedings.

The purpose of the seizure should also be considered in determining its nature for constitutional purposes.²⁶⁶ Generally, such sanctions can be justified on grounds of protection, prevention, or punishment. The seizure in *89 Firearms* may be characterized as a protective action. Under this approach, any property the mere possession of which presents an unreasonable risk to the public safety is subject to forfeiture.²⁶⁷ Because of the dangerous and undesirable nature of the property, the proceeding is in rem and remedial.²⁶⁸ Consequently, the safeguards of criminal process are not required.²⁶⁹

Under a prevention theory, the goal of the action is deterrence.²⁷⁰ The government believes that the seizure will be more effective than any traditional criminal sanction, and through forfeiture of property, it hopes to prevent future transgressions.²⁷¹ To the extent that a seizure may

²⁶⁵ See *89 Firearms*, 465 U.S. at 364; Clark, *supra* note 144, at 478. Professor Clark notes that the Court has long recognized "a category of property 'malum in se' consisting of contraband whose possession by any private citizen is unlawful." *Id.* at 478. As examples, he cites *United States v. Jeffers*, 342 U.S. 48, 54 (1951) (narcotics); *United States v. United States Coin & Currency*, 401 U.S. 715 (1971) (counterfeit money); *United States v. One 1971 Ford Truck*, 346 F. Supp. 613 (C.D. Cal. 1972) (unregistered sawed-off shotguns). Significantly, Clark proposes that while the distinction between beneficial property and contraband is "logically satisfying" in the attempt to classify property forfeitures as criminal or civil, there are many cases where non-contraband was seized and the court refused to consider the sanction punitive. *Id.*

²⁶⁶ Comment, *supra* note 244, at 192-95.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See, e.g., *89 Firearms*, 465 U.S. at 363; *Calero-Toledo v. Pearson Leasing Co.*, 416 U.S. 663, 684 (1974).

²⁷⁰ Comment, *supra* note 244, at 193.

²⁷¹ *Id.*

be characterized as preventive, however, it is punitive with respect to the person from whom the property is seized.²⁷² All the constitutional protections should therefore be available to that individual in defending his rights, including the fifth amendment privilege.²⁷³

Similarly, if the property rights were seized under a punishment theory, the government straightforwardly imposes punishment on the transgressor for his past offense.²⁷⁴ The sanction is clearly punitive and therefore criminal for constitutional purposes. Again, all the constitutional protections should be extended to the defendant.²⁷⁵

Pilot decertification, because of its in personam nature and the beneficial nature of the property, is most appropriately viewed as prevention or punishment. The property itself is not dangerous or offensive. Moreover, the government is openly seeking to punish the offender and deter others from following his example. Under either characterization, the proceeding is punitive and the pilot should not be forced to incriminate himself.

It is also significant that pilot decertification serves no compensatory function. In the traditional view, if the action can be brought to compensate the victim for damages, it is civil. Alternatively, if the action is brought to punish the defendant, the sanction is criminal.²⁷⁶ Succinctly stated, "a suit can be viewed as compensatory only if property is transmitted to an identifiable individual or group of individuals and the value of that property is actually determined by estimating the value of the interests lost by the recipient as a result of the actions of the defendant."²⁷⁷ In contrast to the *Ward* penalties which were used to finance pollution control and reclamation pro-

²⁷² *Id.*

²⁷³ See *supra* note 144 and accompanying text.

²⁷⁴ Comment, *supra* note 244, at 193.

²⁷⁵ See *supra* note 144 and accompanying text.

²⁷⁶ Charney, *supra* note 17, at 497.

²⁷⁷ *Id.* at 499.

grams,²⁷⁸ decertification produces no monetary gain. Consequently, decertification is not analogous to traditional civil money damages.²⁷⁹ Instead, it more closely resembles the *Boyd* forfeitures which had "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."²⁸⁰ Only in the broadest sense can the sanction be said to perform a compensatory role.²⁸¹ In fact, it is difficult to conceive of circumstances under which the state may be compensated for an infraction such as reckless flying through the revocation of a pilot's certificate. Furthermore, if the Administrator truly seeks compensation, he is free to pursue monetary sanctions rather than decertification.²⁸²

Alternatively, even purely compensatory sanctions must be reasonably related to the injury suffered by the victim in order to maintain their civil nature.²⁸³ The *Ward* court, for example, noted that if a fine exceeds the amount which would reasonably compensate the government, it then becomes penal.²⁸⁴ Assuming that a monetary value can be attached to the decertification sanction, the figure would bear no rational relation to the damage caused by the pilot.²⁸⁵ In light of this discussion, FAA certificate actions such as that faced by Roach clearly satisfy the *Ward*

²⁷⁸ Federal Water Pollution Control Act, 33 U.S.C. §§ 1321(f), (k), (l) (1988).

²⁷⁹ *Cf. One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972)(forfeiture aided in enforcement of tariff regulations by providing a "reasonable form of liquidated damages for violation of the inspection provisions and serv[ing] to reimburse the government for investigation and enforcement expenses.").

²⁸⁰ *Ward*, 448 U.S. at 254.

²⁸¹ *See, e.g., People v. Briggs*, 114 N.Y. 56, 65, 20 N.E. 820, 823 (1889)(holding that \$500 fine imposed for violation of a deceptive trade statute was not criminal because it sought "indemnity [for] the public for the injury suffered by reason of the violation.").

²⁸² *See, e.g., Federal Aviation Act*, 49 U.S.C. § 1471(a)(1); *Go Leasing*, 800 F.2d at 1518.

²⁸³ *See, e.g., Ward*, 448 U.S. at 1194.

²⁸⁴ *Id.*

²⁸⁵ *Cf. Charney, supra* note 17, at 499, 499 n.122. Professor Charney states that if, for example, the United States suffered a total loss of \$1 billion due to water pollution in a single year and there are 100,000 convicted polluters, a reasonably compensatory sanction might be \$10,000 each, regardless of the extent of the individual's pollution. *Id.* There is no rational method available to make an

Court's inquiry. Despite the difficulties of applying objective criteria to determine the penal or regulatory nature of a sanction, the Court's reliance on legislative history is misplaced. Such legislative history is unreliable and elevates the congressional "labelling power" over the constitutional limits of Congress' authority. While judicial deference is admirable in many contexts, such deference should not come at the expense of the Constitution or the accused.

Further, even in the event that the Court concludes that Congress intended the sanction to be regulatory, its purpose and effect are clearly punitive in nature. Despite the fact that the Act stocks the FAA enforcement procedures with various indicia of civil penalties,²⁸⁶ many certificate actions are totally unrelated to any technical deficiency and instead are used by the FAA to discipline pilots. Any regulatory effect flows from the deterrence created by previous punitive suspensions. Finally, in contrast to typical regulatory penalties, decertification serves no compensatory purpose.

2. *Alternatives to the Traditional View*

Many commentators have directly challenged the traditional distinction between civil and criminal sanctions and have, in turn, proposed alternate standards for making the determination. Professor J. Morris Clark, for example, suggests that the courts presume that a sanction is punitive if it exhibits certain appropriate indicia of punishment.²⁸⁷ This view disregards legislative intent, noting that such reliance leads to "contradictory and disparate results."²⁸⁸ Instead, the approach examines whether the law places special burdens on a group of persons who

analogous calculation regarding either damages inflicted by offending pilots or the loss to the government.

²⁸⁶ See *Roach v. NTSB*, 804 F.2d 1147, 1154 (10th Cir. 1986). See *supra*, notes 196-208 and accompanying text.

²⁸⁷ Clark, *supra* note 144, at 385. Clark, an Associate Professor of Law at the University of Minnesota, proposed the approach in 1976. See *id.* at 379, 385.

²⁸⁸ *Id.* at 385.

have violated some legal prohibition. If so, it presumes that the law is punitive, absent convincing evidence to the contrary. Throughout this final phase of the analysis, the courts should focus on factors such as whether the statute has an alternative purpose, the extent of its over- or under-breadth with regard to those ends, and the availability of less burdensome alternatives.²⁸⁹

By way of illustration, delicensure of attorneys and other professionals may be considered criminal under this standard. The issue centers largely upon a finding of a valid regulatory purpose for the sanction. In support of such an alternative function, Clark submits that members of the class penalized are more likely than others to be untrustworthy in the future. Alternatively, even if no statistical correlation can be produced, the public at large will still draw this conclusion and refuse to place their trust in these individuals. Under this latter view, the delicensure is intended as a means of preserving the public trust in the profession.²⁹⁰ Similar to the suspension of drivers' licenses,²⁹¹ the government defends the sanction by arguing that it does not single out lawbreakers for special burdens and that in any given instance, the offense for which the sanction is imposed is but one of many various indicia of unfitness for which the license may be revoked. The critical question at this juncture is whether the offense at issue actually indicates such unfitness.²⁹² If not, the sanction is overbroad with regard to its regulatory purpose.

The FAA decertification proceedings are closely analogous. Under the Clark scheme, the sanction is presumed to be punitive if it places special burdens on lawbreakers. Absent any statistical correlation between those pilots who have been convicted, for example, of operating an aircraft in a reckless manner, and the number of future

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 486.

²⁹¹ See *supra* notes 225 - 233 and accompanying text.

²⁹² *Id.*

accidents in which these pilots are involved, it is difficult to conclude that decertification or suspension is not specifically directed at the offender. Moreover, given the fact that the FAA and the courts concede that many such sanctions are totally unrelated to the pilot's technical qualifications, it is even more difficult to conclude that such a conviction represents an indicia of unfitness. For this reason, the sanction is overbroad with regard to its ostensible regulatory purpose and the presumption of its punitive nature should not be defeated.

A second commentator has proposed another alternative standard. This view incorporates many of the elements already discussed in the various sections above. Specifically, it focuses on the compensatory nature of the typical civil damage award and the notion of the state as plaintiff. It also credits, to a certain extent, the notions of legislative purpose. In this view, an involuntary and uncompensated loss of life, liberty, or property must be characterized as criminal if (1) the loss is authorized or allowed by the government; (2) the procedure for quantifying the loss does not limit the loss to that which is required to compensate another for a previous wrong; (3) the loss is inflicted not merely for the purpose of general deterrence;²⁹³ and (4) the loss is determined on the basis of retribution or is an unreasonable or unnecessary incidental effect of government action.²⁹⁴

²⁹³ Charney, *supra* note 17, at 510. In Charney's scheme, the distinction between general and specific deterrence plays a large role in the ultimate determination of the essential nature of a sanction. A sanction serves a "specific" deterrent function if it inflicts an injury on an individual or group of individuals as a result of a previous transgression for the purpose of preventing a recurrence of that transgression by that individual or group of individuals. If the loss is triggered by the undesired conduct, the sanction is criminal. *Id.*

In contrast, if the sanction inflicts a loss on a person or group of persons in order to control future conduct of all persons in the society without regard for past actions of the group, it serves as a general deterrent. A gasoline purchase tax, for example, aimed at reducing gasoline consumption, is a general deterrent. In that case, the loss is inflicted merely to influence future conduct, without regard for any past actions, and the group affected is rationally related to the purpose sought. Therefore, the sanction is not criminal. *Id.*

²⁹⁴ Charney, *supra* note 17, at 507-12.

For instance, the ostensibly civil penalties mandated by the Intercoastal Shipping Act²⁹⁵ are criminal under this second approach. In this Act, the government has sanctioned the loss imposed, and the procedure for determining the amount of the penalty is largely unrestricted.²⁹⁶ The apparent basis for the computation of the amount of the fine is retribution or specific deterrence. The Act, however, cannot serve as a general deterrent because it addresses a past infraction. Finally, the government is not exerting direct control over intercoastal shipping, but is instead utilizing the incidental effects of such fines to encourage compliance with all applicable statutes and regulations. In light of this analysis the constitutional protections guaranteed to criminal defendants must be available.²⁹⁷

FAA decertification proceedings may be similarly analyzed. The government sanctions the loss, and the extent of the sanction is practically unlimited. It also addresses a past transgression and serves as a specific deterrent. The only legitimate basis for the determination of the extent of the sanction is retribution and its prospective deterrent value. Finally, the essence of the penalty is not direct control over air traffic but punishment of offending pilots. The government relies on the incidental deterrent impact of the certificate actions to encourage compliance with the federal regulations and statutes. Consistent with the analysis above, certificate actions should therefore be considered criminal sanctions for constitutional purposes.

C. *Decertification Is a "Quasi-Criminal" Sanction*

Alternatively, decertification is, at a minimum, a "quasi-criminal" proceeding in which fifth amendment protection should be available. Decertification, for example, bears many of the hallmarks of traditional quasi-criminal proceedings. As discussed extensively above, decertifica-

²⁹⁵ 46 U.S.C. §§ 814-15, 817, 831, 844 (1988).

²⁹⁶ *Id.* §§ 814-15, 817, 831, 844.

²⁹⁷ Charney, *supra* note 17, at 514-15.

tion is frequently a purely punitive sanction.²⁹⁸ This punitive nature is the very essence of the quasi-criminal doctrine.²⁹⁹ Moreover, *Boyd*, by its own language, extends the protections of the fifth amendment to all proceedings for the infliction of “*penalties and forfeitures*” for offenses against the law.³⁰⁰

Significantly, analogous proceedings have been classified as quasi-criminal largely on the basis of their punitive effect. In Illinois, for example, the violation of a traffic regulation is a quasi-criminal offense.³⁰¹ In *Bootz v. Childs*,³⁰² an Illinois federal district court concluded that the privilege against self-incrimination is available in proceedings to impose fines for the violation of traffic regulations.³⁰³ In that case, *Bootz* was arrested and charged with operating a bicycle after dark without lights and failing to stop at a stop sign. He brought suit against the arresting officers and the city, alleging selective prosecution and infringement of his civil rights. At his deposition, he invoked the fifth amendment, refusing to incriminate himself by stating “whether he committed the bicycle violations.”³⁰⁴

Citing Rule 501,³⁰⁵ the court held that *Bootz* was enti-

²⁹⁸ See *supra* notes 214 - 287 and accompanying text.

²⁹⁹ Clark, *supra* note 144, at 417.

³⁰⁰ *Boyd v. United States*, 116 U.S. 616, 634 (emphasis added).

³⁰¹ See ILL. ANN. STAT. ch. 110A para. 501 (Smith-Hurd 1985).

³⁰² 627 F.Supp. 94 (N.D. Ill. 1985).

³⁰³ *Bootz*, 627 F. Supp. at 101. See also *Carson v. Polly*, 689 F.2d 562, 576 (5th Cir. 1982) (evidence in a civil damage suit, otherwise excludable under FED. R. EVID. 404(a), is admissible because an assault and battery suit is “close to one of a criminal nature.” Other states have rejected this position. New York, for example, has classified traffic violations as civil offenses. *People v. Amitrano*, 59 Misc. 2d 471, 299 N.Y.S.2d 275, 277 (1st Dist. 1969) Significantly, even within that jurisdiction, judges have expressed concern over excessive deference to the legislature in this arena. One dissenter argued that “simply because the legislature chose to label these wrong-doings as ‘traffic infractions’ rather than ‘crimes,’ a defendant’s constitutional rights should not be made to disappear.” *Amitrano*, 299 N.Y.S.2d at 278 (quoting *People v. Letterio*, 266 N.Y.S.2d 368, 374, 213 N.E.2d 670, 673 (1965)(Desmond, C.J., dissenting)).

³⁰⁴ *Bootz*, 627 F. Supp. at 99.

³⁰⁵ ILL. ANN. STAT. ch. 110A, para. 501.

tled to the protection of the fifth amendment.³⁰⁶ The court further stated that traffic violations constituted "quasi-criminal offenses."³⁰⁷ The court also noted that Illinois state courts had already extended the fifth amendment privilege to defendants in the closely analogous cases of municipal ordinance violations.³⁰⁸ For these reasons, the court concluded that "[u]nder the long-standing ruling of *Boyd v. United States*, the [s]elf-[i]ncrimination privilege applies."³⁰⁹

The *Bootz* court distinguished *Ward* on the grounds that Federal Water Pollution Control Act sanctions³¹⁰ are primarily compensatory in nature.³¹¹ The court noted that proceeds derived from the sanctions "were used to repair the damage due to water pollution, and [were] therefore more analogous to a civil damage award than a criminal fine."³¹² In the case of a fine imposed for a traffic violation, the court concluded, "there is no remedial purpose to the fine imposed and it is simply intended as a punishment."³¹³

In addition to its punitive nature, decertification is properly quasi-criminal because it is more closely analogous to the *Boyd* property forfeiture than a civil damages award. Arguably, the pilot's rights in his certificate rise to the level of a legal entitlement amounting to a constitutionally protected property interest.³¹⁴ Such interests, the

³⁰⁶ *Bootz*, 627 F. Supp. at 101. In language reminiscent of *Boyd*, Rule 501 of the Illinois Supreme Court also recognizes the dual nature of such proceedings. Therein, the court states that while traffic offenses are "not violations of the general criminal laws," they are a "hybrid class of regulatory and penal offenses." ILL. ANN. STAT. ch. 110A, para. 501 (1985 Historical Notes).

³⁰⁷ *Bootz*, 627 F. Supp. at 100.

³⁰⁸ *Bootz*, 627 F. Supp. at 100 (citing *Hoban v. Rochford*, 73 Ill. App. 3d 671, 392 N.E.2d 88 (1979); *City of Chicago v. Lord*, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954)).

³⁰⁹ *Bootz*, 627 F. Supp. at 100.

³¹⁰ 33 U.S.C. § 1321(b)(6) (1988).

³¹¹ *Bootz*, 627 F. Supp. at 100-01.

³¹² *Id.* at 100.

³¹³ *Id.* at 100-01.

³¹⁴ *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1380 (9th Cir. 1989); see also *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Court has held, must exceed the mere "abstract need or desire" for the rights, and instead represent a "legitimate claim of entitlement."³¹⁵ Legitimate claims of entitlement, in turn, are created by "existing rules or understandings that stem from an independent source such as state law."³¹⁶ Under this standard, contracts or statutes providing for the revocation of rights or privileges only "for cause" are typically considered to confer some degree of property rights.³¹⁷

The Act arguably creates an entitlement in the pilot's certificate as it confines the government's discretion to revoke or suspend the rights of the pilot and generates the expectation that certificates will be renewed in the absence of good cause for denial. While providing for the periodic re-examination of airmen, the Act allows revocation or suspension of licenses only if required for safety in air commerce or transportation or the public interest.³¹⁸ Furthermore, courts have already applied this reasoning to several analogous proceedings. Proceedings to revoke a drivers license³¹⁹ or a permit to operate a day care center,³²⁰ for example, must provide the defendant with some minimum quantum of due process. The analysis is unaffected by whether the entitlement is termed a "right" or a "privilege."³²¹

Significantly, the Act impliedly concedes the pilot's entitlement by establishing extensive proceedings to ensure that pilots receive notice as well as the opportunity to be heard prior to any deprivation of their rights.³²² Further-

³¹⁵ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

³¹⁶ *Id.*; see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).

³¹⁷ See, e.g., Perry v. Sindermann, 408 U.S. 593 (1972). This analysis recognizes that such pacts generate expectations that deserve constitutional protection. The purpose of the "ancient institution of property," the Court has stated, is to "protect those claims upon which people rely in their daily lives." *Roth*, 408 U.S. at 577. According to the Court, that reliance "must not be arbitrarily undermined." *Id.*

³¹⁸ 49 U.S.C. app. § 1429(a) (1988).

³¹⁹ Bell v. Burson, 402 U.S. 535, 539 (1971).

³²⁰ Chalkboard, 902 F.2d at 1377.

³²¹ Bell, 402 U.S. at 539.

³²² 49 U.S.C. app. § 1429(a).

more, while the fourteenth amendment does not encompass the self-incrimination privilege, the notion of punishing an individual on the weight of his own testimony is incompatible with the broader notions of fairness embodied in that amendment. In fact, in light of the Act's extensive notice and hearing provisions, the extension of the self-incrimination privilege is a minimal additional burden.

In *Roach*, the Tenth Circuit rejected the pilot's claims that the suspension hearing was quasi-criminal for the same reasons that it concluded that the proceedings were not criminal.³²³ Specifically, the court found a lack of punitive legislative intent and a "lack of any evident danger that Roach will prejudice himself in respect to later criminal proceedings."³²⁴ This reasoning is suspect for several reasons. First, the court placed great reliance on the legislative intent behind the statute. This again affords excessive deference to the intent of the legislature, and for reasons already enumerated, is inappropriate to the role of the court.³²⁵

Furthermore, the court's reference to future criminal proceedings is puzzling.³²⁶ This consideration is more properly confined to the invocation of the witness' privilege.³²⁷ The *Boyd* decision, for example, does not advert to any risk of future criminal prosecution.³²⁸ Moreover, to the extent that it does merit consideration, this factor weighs heavily in favor of quasi-criminal classification. Specifically, in Colorado, Roach's state of residence, the reckless operation of an airplane is a crime. In fact, the state has prosecuted individuals for the violation of this standard.³²⁹ If Colorado had charged and prosecuted

³²³ *Roach*, 804 F.2d at 1155.

³²⁴ *Id.* at 1155 n.8.

³²⁵ See *supra* notes 251-264 and accompanying text.

³²⁶ *Roach*, 804 F.2d at 1155 n.8.

³²⁷ See *supra* notes 103 - 141 and accompanying text.

³²⁸ See Clark, *supra* note 144, at 417.

³²⁹ *People v. Agnew*, 113 P.2d 424 (Colo. 1941). In *Agnew*, the Colorado Supreme Court upheld the validity of a statute making it a misdemeanor to oper-

Roach under this statute, he would have been entitled to all the protections of constitutional criminal procedure. Thus, much like *Boyd*, *Roach* is a case in which the defendant faced forfeiture by reason of an offense. Unlike the *Boyd* court, however, the Tenth Circuit allowed the form of the proceeding to effectively dictate the defendant's constitutional rights.

D. *The Witness' Privilege*

Finally, the courts and administrative tribunals should accede to the invocation of the witness' privilege by a pilot facing decertification. Under the Court's more recent pronouncements, the defendant's expectation of future criminal prosecution need only be such that he "reasonably believes" that his testimony could prejudice him in later criminal proceedings.³³⁰ Furthermore, testimony should be compelled only if it "clearly appears to the court that [the witness] is mistaken."³³¹ Reckless operation of an aircraft is a criminal offense in many states, and there is no reason to believe that states could not use information revealed in a decertification proceeding to indict pilots on criminal charges.

In *People v. Agnew*,³³² for example, the state of Colorado charged the defendant pilot with the crimes of "low" and "imminently dangerous" flying, in violation of state law.³³³ Analogizing to motor vehicle laws, the state supreme court affirmed the conviction as a valid exercise of the state's police power.³³⁴ Similarly, a recent Second Circuit opinion holds that in order for the privilege to attach, a witness in a federal administrative or judicial pro-

ate an aircraft in a manner "imminently dangerous to persons or property." *Id.* at 425. Noting that the regulation of aircraft is "not substantially different from . . . regulating the manner of driving automobiles," the court found that such a statute was well within the police powers of the state. *Id.* at 426.

³³⁰ *Kastigar*, 406 U.S. at 444-45.

³³¹ *Hoffman*, 341 U.S. at 486.

³³² 113 P.2d 424 (Colo. 1941).

³³³ *Id.* at 425.

³³⁴ *Id.* at 426.

ceeding need merely establish that state authorities would have access to the testimony and that they could legally use it.³³⁵ In the absence of a grant of immunity, there is no reason to believe that the testimony of the pilot may be unavailable to the state.

In addition, the United States Supreme Court has repeatedly emphasized the need for the trial courts to construe broadly the fifth amendment's protection. The self-incrimination privilege, the Court has stated, reflects the nation's most "fundamental values and aspirations, and marks an important advance in the development of our liberty."³³⁶ It must, the Court has stated, be "accorded liberal construction in favor of the right it was intended to secure."³³⁷ One of the primary goals of the fifth amendment is the preservation of an equitable "state-individual balance by requiring the government to . . . shoulder the entire load."³³⁸ The notion of decertification proceeding solely, or even largely, on the weight of the pilot's own testimony offends this delicate balance.

Furthermore, the benefits of extending the privilege far outweigh any additional costs it might impose. The Act already provides a great deal of due process to defendant pilots. Moreover, any additional burdens should be considered in light of the nation's "fundamental values."³³⁹ In *Hoffman*, for example, the Court stated that while its holding might add to the government's "burden of diligence and efficiency," the contrary conclusion would "seriously compromise an important constitutional liberty."³⁴⁰ "The immediate and potential evils of compulsory self-disclosure," the Court concluded, "transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of

³³⁵ *In re Grand Jury Proceeding* (United States v. Buckley) 860 F.2d 11 (2d Cir. 1988).

³³⁶ *Kastigar*, 406 U.S. at 444 (footnotes omitted).

³³⁷ *Hoffman*, 341 U.S. at 486.

³³⁸ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

³³⁹ *Kastigar*, 406 U.S. at 444.

³⁴⁰ *Hoffman*, 341 U.S. at 489-90.

crime.”³⁴¹

In *Roach*, the court noted that the pilot presented no “facts as to whether [future criminal] prosecution is likely or even possible on the basis of the statements he made at the hearing.”³⁴² This objection hollowly echoes in light of the minimal showing required by the Court to establish entitlement to the privilege. Even under the more restrictive *Marchetti* standard, had Roach specifically invoked the witness’ privilege in response to the questions at issue, the fifth amendment should have provided Roach protection. Because reckless flying is a crime in Colorado, his testimony was coextensive with that necessary to establish a crime. It is difficult to imagine circumstances engendering a more reasonable fear of future criminal prosecution.³⁴³ Furthermore, the record contains no indication that the ALJ attempted to compel Roach’s testimony through a grant of immunity or that it would not be available to state aviation authorities.

VII. CONCLUSION

The decision of the Tenth Circuit notwithstanding, there is an appropriate role for the fifth amendment privilege against self-incrimination in pilot decertification proceedings. Courts and scholars alike have agreed that the defendant in a punitive proceeding should be afforded protection from self-incrimination. In *Ward*, the Court made clear that punitive sanctions may be characterized by either a punitive legislative intent or a punitive purpose and effect. While decertification is part of an extensive regulatory scheme, it is not remedial in any regard. It

³⁴¹ *Id.*

³⁴² *Roach*, 804 F.2d at 1152 n.5.

³⁴³ Admittedly, *Agnew*, the only reported instance of a prosecution for such an offense, was forty five years old. Given, however, that the Colorado statute remained on the books, prosecution remained a viable possibility. The court should not require that the witness become acquainted with the state’s historical efforts, or lack thereof, to enforce its own laws. Because Roach was subject to sanction under that statute at the discretion of the state, he should be entitled to rely on it in claiming the self-incrimination privilege.

is, by its nature, punishment for a legal transgression. Many certificate actions are totally unrelated to the pilot's technical qualifications. They are not, for example, imposed to allow time for the correction of a dangerous defect. In fact, the FAA has explicitly stated that certificate actions may be imposed for purely disciplinary reasons, and the courts have strongly supported this position.

Any remedial effect of decertification is derived from its deterrent impact. No FAA statistics suggest that formerly suspended pilots are less likely to endanger the public safety. This is especially apparent in the case of perfectly qualified pilots who have been suspended for purely disciplinary reasons. To the extent that any such diminishment is achieved, it is attributable to the deterrence created by the sanctions. Significantly, the Supreme Court has noted that deterrence is not a legitimate, non-punitive government objective.

Unlike typical civil damage awards, certificate actions do not serve any compensatory function. In contrast to the sanctions at issue in *Ward*, it does not follow that decertification reimburses the injured party for any of its losses. Decertification is a non-monetary sanction. The alleged injury is intangible and incapable of accurate measure. In addition, because the sanction cannot be rationally related to the offense, it is necessarily overbroad. Under current standards, overbroad remedial sanctions are punitive in effect.

Even in the event that the court does find a remedial legislative intent, a sanction clearly punitive in its effect may be criminal nonetheless. The courts, however, have demanded the clearest proof of this punitive impact. As previously noted, this analysis is objectionable for its excessive deference to a perceived legislative intention. In determining the availability of constitutional rights on the basis of Congressional preference, the Court neglects its role as the protector of constitutional rights. Because the Constitution defines the limits of governmental power,

Congress must not be permitted to dictate the contours of Constitutional rights without close judicial scrutiny.

If congressional preference is worthy of judicial note, reliance on legislative history to ascertain such intent is ineffective. It is inaccurate at best, and because it is composed of the highly politicized remarks of only a few individuals, rarely, if ever, may it be said to truly reflect the intent of Congress as a whole. In fact, the Court has explicitly rejected such reliance in many other contexts.

Under the *Boyd* doctrine, decertification need not be a traditional criminal proceeding in order to extend the fifth amendment privilege to the defendant pilot. The Court has made it very clear that the fifth amendment is unlike other constitutional protections. It is, for example, "broader"³⁴⁴ and entitled to "broad construction."³⁴⁵ Consequently, it is applicable to proceedings that the Court has recognized are not technically criminal in nature. These quasi-criminal proceedings are frequently hybrids of a dual regulatory and penal nature; their common characteristic is a punitive purpose or effect.

Decertification fits neatly into the quasi-criminal paradigm. First, it is a punitive sanction. As noted above, the FAA has argued and the courts have sustained the power of the Administrator to prosecute certificate actions without regard for the pilot's qualifications and for purely disciplinary reasons. Decertification is analogous to the *Boyd* property forfeiture in that it represents the loss of property rights by reason of an illegal act. Because of the severe constraints on the power of the Administrator to revoke the pilot's certificate rights, the pilot's claims rise to the level of an entitlement. This level of expectation should be recognized and protected by the courts.

An implicit, unifying theme of the quasi-criminal cases is the intuitive feeling of the courts that a forfeiture based on the defendant's own testimony is, at a minimum, un-

³⁴⁴ *Helvering v. Mitchell*, 303 U.S. 391, 400 n.3 (1938).

³⁴⁵ *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

fair, and is in some sense unconstitutional. Indeed, it is difficult to reconcile the extensive care taken to provide the defendant pilot with a great measure of due process in such instances with the willingness of the courts to allow the compulsion of self-incriminatory testimony. While the fourteenth amendment due process clause does not require the extension of the self-incrimination privilege, it does contain broad notions of fair play and a careful balancing of government and individual interests, both of which are offended by the refusal of the courts to extend the protection of the fifth amendment to pilot decertification proceedings.

Regardless of the blanket protection of the defendant's privilege, there is little question that pilots should be extended the right to refuse specific inquiries that pose a threat of future criminal prosecution. Under current standards, a "reasonable fear" of future criminal prosecution which is not merely "trifling" should entitle the pilot to invoke the privilege in the absence of a grant of immunity. To the extent that the criminal laws of a given state impose duties and obligations on pilots, they should be privileged from disclosing information co-extensive with that needed to establish a crime under state law, while the corresponding evidentiary showing required by the court should be minimal.